(1) No. 97 • 432 MAY 2 2 1997

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In The

Supreme Court of the United States

October Term 1996

ROBERT S. HEIMANN,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITION FOR WRIT OF CERTIORARI

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180 pp

QUESTION PRESENTED

1. Whether it is a violation of Due Process to deprive an individual of his right to be employed and earn a living by selling fresh produce where his Administrative Hearing was tainted by the admission of inflammatory and irrelevant evidence.

LIST OF PARTIES

The parties to the immediate proceedings below were the petitioner, Robert S. Heimann, and respondent, United States Department of Agriculture. Midland Banana and Tomato Co., Inc., Susan E. Heimann, Jeffrey B. Heimann, Royal Fruit Co., Inc., and petitioner were parties to the administrative disciplinary proceedings below and in the administrative appeal.

Petitioner, Robert S. Heimann and Respondent, United States Department of Agriculture are the only parties before this Court.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner Robert S. Heimann respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled proceeding on January 7, 1997.

OPINIONS BELOW

The opinions below stem from consolidated disciplinary proceedings brought under the Perishable Agricultural Commodities Act , 1930, as amended (PACA 7 U.S.C. § 499a *et seq.*). On July 26, 1994 Administrative Law Judge Edwin S. Bernstein (ALJ) filed an Initial Decision and Order finding in No. D-93-548 that Midland Banana & Tomato Co., Inc., Susan Heimann, and Robert S. Heimann violated section(8)(c) of PACA (7 U.S.C. §499h(c)).

In No. D-93-549 the ALJ found that Royal Fruit Co., Inc., and Robert S. Heimann committed willful, flagrant and repeated violations of section 2(4) of PACA(7 U.S.C. § 499b(4)).

Midland Banana & Tomato Co., Inc., Susan E. Heimann, and Robert S. Heimann (in No D-93-548), and Robert S. Heimann (in No. D-93-549) appealed toa Judicial Officer who affirmed the ALJ's Decision in an August 15, 1995 Order. The Judicial Officer's opinion is reprinted in the Appendix p. *infra.*

Pursuant to 28 U.S.C. §2342 an appeal was filed in the United States Court of Appeals, for the Eighth Circuit. The Eighth Circuit affirmed the decision of the

Judicial Officer in an opinion dated January 7, 1997. A copy of the opinion is reprinted in the Appendix p. *infra.*

JURISDICTION

Pursuant to the Perishable Agricultural Commodities Act , 1930, as amended (PACA 7 U.S.C. § 499a *et seq.*) a disciplinary proceeding was brought against the Petitioner by the United States Department of Agriculture. On July 26, 1994 Administrative Law Judge Edwin S. Bernstein (ALJ) filed an Initial Decision and Order finding petitioner had violated PACA.

The ALJ's decision was appealed to a Judicial Officer who affirmed the ALJ's decision on August 15, 1995.

The Petitioner appealed the Judicial Officer's Order to the United States Court of Appeals, for the Eighth Circuit. The Eighth Circuit affirmed the decision of the Judicial Officer in an opinion dated January 7, 1997.

On March 25, 1997, Justice Thomas ordered that the time for filing this petition for writ of certiorari be extended to and including May 22, 1997.

The Jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offence to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner has worked in the produce industry as a seller of fresh fruits and vegetables for mor than twenty-five years. Having devoted most of his working life to the produce industry, petitioner has attained a great deal of experience in this field. The opinions below deny petitioner the right to earn a living in the only field within which he has any practical experience.

In 1993, a disciplinary proceeding was brought against the petitioner, Susan E. Heimann, Midland Banana and Tomato Co., Inc., and Royal Fruit Co., Inc., by the United States Department of Agriculture. The complaints alleged that, 1) petitioner and Royal Fruit Co., Inc. violated section 2(4) of the Perishable Agricultural Commodities Act (PACA) (7 U.S.C. §499b(4) by failing to make full payment promptly for purchases of perishable agricultural commodities in interstate and foreign

commerce, 2) petitioner, Susan E. Heimann, and Midland Banana and Tomato Co., Inc., violated section 8(c) of PACA (7 U.S.C. §499h(c), by making false and misleading statements on Midland's PACA license application.

Throughout the disciplinary proceeding, the Administrative Law Judge allowed into evidence testimony and documents, which petitioner objected were prejudicial and irrelevant. The evidence admitted concerned events unrelated to the allegations at hand that had occurred as far back as 1977. The ALR's Decision and Order, is fraught with examples of the central role the admitted evidence played inhis findings at the disciplinary proceeding. There were two particular situations which were unrelated to the disciplinary proceeding, but played a large role in shaping the ALJ's opinion in this case.

First, evidence was admitted of petitioner's role in the 1977 failure of Gilbert Brokerage. Petitioner claimed that such evidence was prejudicial and irrelevant to the present Disciplinary Proceeding.

Second, evidence was admitted of a Disciplinary Complaint brought against United KC, a produce company, after petitioner had left United KC's employment. Petitioner claimed evidence of the Disciplinary complaint brought against United KC, after petitioner had left United KC's employment and the resultant Consent Order were inflammatory, prejudicial, and irrelevant as to petitioner because they were not part of the charges in his case. Additionally, petitioner was not charged in the United KC case or given any opportunity to testify or defend himself or even given notice of the allegations others made about him in the

Consent Order. Despite petitioner's objections, evidence of these two occurrences was admitted into evidence.

> The Petitioner appealed the ALJ's ruling to the Judicial Officer. Petitioner raised twenty-four findings made and inferences drawn by the Administrative Law Judge which were unsupported by the evidence. On review, the Judicial Officeraffirmed the ALJ on every point. Of special importance, is that the Judicial Officer who reviewed the ALJ's Decision was exceptionally influenced by the evidence admitted by the ALR. In the Judicial Officer's Preliminary Statement he stated: The ALJ [Administrative Law Judge] has done a commendably meticulous job of explicating the evidence from a very large record. . . involving Respondent Robert S. Heimann dating back to the mid-70's....
>
> The evidence shows that Robert S. Heimann's legacy of 20 years of unfair trade practices has been passed to his children....
>
> It has been arduous for the Complainant to amass the kind of evidence necessary to uncover about two decades of Robert S. Heimann's sophisticated abuse of the system. I note here that the record shows huge losses over these years to other produce dealers and suppliers--because of Robert S. Heimann--in the many hundreds

> of thousands of dollars. There are expensive recent examples, too. For instance, Mr. Perryman testified that Robert S. Heimann caused him to lose $450,000, since hewas the succeeding owner of United K.C., Inc., which closed because of Robert S. Heimann's misbehavior. Royal stipulated to owing $423,302.70, and Gilbert left sellers holding the bag for about $50,000. The American taxpayer apparently has been left holding one SBA-guaranteed mortgage note for 85% of about one-half million dollars; and the other smaller SBA loan (to Royal) is in default at $55,000. Robert S. Heimann's misbehavior has been very expensive for a lot of people, for a lot of years. [D&O p.42-4; 53a-54a. Citations omitted. Emphasis supplied.]

Of this list of allegations against the petitioner, only the Royal debt is the subject of the complaint in this case. Later, the Judicial Officer wrote that:

> Robert S. Heimann has the least credibility... for a number of reasons. Primary to me is the fact that Robert S. Heimann walked away from The Gilbert Corporation proceedings in the 1970's.... [D&O p.48; 59a]

In due course, petitioner appealed the Judicial Officer's Decision to the United Stated Court of Appeals for the Eighth Circuit. The petitioner invoked the Eighth Circuit's jurisdiction under 28 U.S.C. §2342 to review

"final orders" of theSecretary of Agriculture. Petitioner asserted that the introduction of the irrelevant evidence prejudiced the Secretary and denied petitioner the fundamental fairness required in administrative hearings by the Due Process clause of the Fifth Amendment. An appeal was taken by petitioner pursuant to 28 U.S.C. §2342. The Eighth Circuit affirmed the decision of the Secretary and ruled that petitioner's Due Process rights were not violated.

REASONS FOR GRANTING THE WRIT

I. The U.S.D.A. hearing was tainted by inflammatory and prejudicial evidence which was irrelevant to the allegations of the disciplinary complaints but which became the central focus of the Decision and Order.

Evidence of events in petitioner's past which have no relevance to the Disciplinary Complaints filed against petitioner became the central focus of the hearing and the resulting Decision and Order. The lack of relevance of these historic events is analyzed below in detail. However, one need not read far to fully understand the central role these irrelevant events played in the findings made and inferences drawn by the Administrative Law Judge and Judicial Officer. The Preliminary Statement of the Judicial Officer printed *supra* in the Statement of the Case makes this quite clear.

The issues as to Robert S. Heimann in this case are narrow - his relationship to Royal Fruit and Midland Banana between 1989 and 1992. However, it is readily apparent that the Judicial Officer's decision was colored

by evidence of a multitude of acts other than those charged. A further indication of the departure from neutrality and detachment is the number of findings and inferences which are unsupported or, in some cases, wholly contradicted by the evidence as will be discussed below.

> A. Evidence of petitioner's involvement in a produce business which failed in 1977 was totally unrelated in fact and in time to the instant case and served only to prejudice the Administrative Law Judge and the Judicial Officer.

Extensive evidence was introduced by the Department to establish that Gilbert Brokerage, petitioner's produce business in the mid-1970's, failed leavingapproximately $57,000 in unpaid reparations.1

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1 PACA Specialist John Clark testified that Bob Heimann had been notified in the mid-1970's that he was under suspension pursuant to 7 U.S.C. 499m(b) until records of Gilbert Brokerage, a PACA licensee owned by Robert Heimann, were made available for inspection. Respondents objected to Mr. Clark's testimony because it was irrelevant (T. 516), hearsay (T. 522) and not the best evidence (T. 524).

7 U.S.C. 499m(b) provides, in part:

> If any such commission merchant, dealer, or broker refuses to permit such inspection..., the Secretary may publish the facts and circumstances and, by order, suspend the license of the offender until permission to make

The Decision and Order finds that the:

> history of The Gilbert Brokerage Co. was necessary as a major part of the explanation for Robert S. Heimann's later dominion and control of his companies from the background, behind the scenes, without the appearance of holding a responsible position." (D&O p. 78-9; 88a-89a).

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such inspection is given....

No such publication of facts and circumstances or order was produced at the hearing. Mr. Clark sought to excuse the failure to produce the alleged order by testifying that it had been destroyed by "federal records disposition practices" (T. 550). When asked whether the records disposition schedule authorizes the destruction of orders which are still valid and pending orders, Mr. Clark testified that "[t]he records disposition schedule makes no reference." (T. 551).

Mr. Clark's testimony is incorrect. 44 U.S.C. 3101 provides that:

> The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transaction of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

Indeed, the Judicial Officer wrote that the central issue in the case was "that Robert S. Heimann controlled companies from the background to escape PACA officials' investigations." (D&O p. 70; 80a).

The attribution of motive to petitioner does not square with the law or with the facts. Because many years had elapsed following the reparation orders against Gilbert, the orders did not provide a basis to deny Heimann a PACA license in the late 1980's. 7 U.S.C. §499d(b) provides, in part:

> **(b) The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is a person who, or is or was responsibly connected with a person who...**
>
> **(d) Has failed ... to pay any reparation order issued against him <u>within two years</u> prior to the date of the application. [emphasis supplied].**

7 U.S.C. §499h(b) of P.A.C.A. provides, in part, that:

> **(b) Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person - (1) whose license has been revoked or is currently suspended by order of the Secretary;... or (3) against whom there is an unpaid reparation award <u>issued within two years</u>... [emphasis supplied].**

Clearly, any reparation orders against Gilbert Brokerage in 1976 had no bearing on the ability of petitioner to return to the industry after the two-year suspension had elapsed.

The Decision and Order finds that:

> because the demanded Gilbert records were not produced, Robert S. Heimann was under a continuing suspension, until such time as the records were produced. (D&O p.102; 112a).

The Judicial Officer totally discredits petitioner's testimony that, in the early 80's, he had been told by the regional chief of PACA that because the two year suspension had been served, there would be no bar to petitioner's return to the produce industry. (T. p.618-19). However, the Judicial Officer is not able to cite even a single case as precedent for this theory of an ongoing suspension or, moreimportantly, there is no evidence that petitioner was on notice or even aware of this suspension. Hence, an alleged suspension unknown to petitioner cannot provide him with a motive.

The story of the suspension was contrived to support the introduction of the otherwise irrelevant evidence. The truth is readily discernable by examining the actions (or non-actions) of the PACA Branch with regard to petitioner. Despite the Department's claim that petitioner had been under an ongoing suspension since the seventies, why was no action taken to terminate his employment at United KC in the 80's or at Royal in the 90's. (T. p.618-19). It is clear that the PACA branch

knew full well where petitioner was working - he was still at United KC when the investigation commenced and all the parties at United KC knew he was at Royal after leaving United KC. (T. p.523). There was no testimony, no documents, or any other evidence to support this theory of "ongoing suspension" other than the testimony of Clark at the hearing. At no time did Clark testify that Heimann was ever put on notice of the alleged ongoing suspension.

B. Evidence of a Disciplinary Complaint brought against United KC after petitioner had left UKC's employment and the resultant Consent Order were inflammatory, prejudicial, and irrelevant as to petitioner because they were not part of the charges in this case, nor was petitioner charged in the UKC case or given any opportunity to testify or defend himself or even given notice of the allegations others made about him in the Consent Order.

Extensive evidence was introduced by the Department concerning a PACA complaint filed in late 1989 against United KC (UKC), a produce business in Kansas City. In the mid-1980's, petitioner had been the general manager for UKC. Duringpetitioner's tenure at UKC, the Department conducted an investigation into the use of false or forged government inspection certificates at UKC. Petitioner left UKC in mid-1989, shortly after the business was sold to Douglas Perryman. The evidence is undisputed that prior to Perryman's purchase of UKC, USDA officials told both petitioner and Perryman that

the investigation was closed without any action being taken.

However, in late 1989, after petitioner's departure from UKC, the Department filed a PACA disciplinary complaint against UKC. (AP 8). The complaint did not name petitioner as a party or name him in any of its allegations. No testimony was taken from petitioner nor was petitioner even notified of the complaint's filing. Approximately six months after the complaint was filed, the Department and UKC entered into a Consent Order admitting to the allegations and specifically blaming petitioner for the alleged misconduct. (AP 9).

As with the introduction of evidence of the Gilbert failure, the Department justified the UKC evidence as being the reason petitioner avoided an ownership position at Royal. This ruse to introduce inflammatory evidence is absurd. Thereis no evidence that petitioner was even aware of the disciplinary complaint against UKC. Notwithstanding the fact that petitioner's employment at Royal Fruit was well known to David Breen, an executive with the prior owner of UKC, and Douglas Perryman, the new owner of UKC, the evidence is clear that PACA officials never named petitioner as a party in the disciplinary complaint or took any action to restrict his employment at Royal Fruit.

The testimony and exhibits relating to the PACA complaint against UKC for false and misleading

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2 One need look no further than *In re: MCM Livestock, Inc. et al.*, 39 Agric. Dec. 893 (1980) to find a case where the manager of the licensee (as Bob Heimann was at United KC) was individually named in a disciplinary complaint.

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inspection reports are not competent evidence against Bob Heimann and fail to establish any misconduct by the petitioner relevant to the allegations in this case.3

Petitioner was not named as a party or even mentioned in the disciplinary complaint filed against UKC. (CX 64). Nevertheless, the Decision and Order apparently accepted the opinions of Doug Perryman and David Breen which blamedpetitioner for alleged inspection violations.. Their opinions should not have been considered. Perryman testified that he did a lengthy due diligence before purchasing UKC and heard about a PACA investigation involving the company. Perryman asked Mr. White of the PACA southwest branch about the investigation and was assured that "the investigation was over and done with". (T. 99). Perryman never asked petitioner about the investigation. (T. 99-100). Although both Perryman and Breen claim to have investigated the allegations after the complaint was filed, neither of these witnesses ever spoke to petitioner about the allegations. (T. 74, 145). The investigation by Breen and Perryman so limited because UKC negotiated a consent order that shifted the blame to petitioner from the principals of

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3 The Complaint and the Decision and Order in *re: United K.C., Inc.*, PACA D-90-513 (CX 64) was admitted over the objection of the Respondents. (T.57). Bob Heimann's failure to deny participation in preparing false inspection reports at United K.C. cannot be deemed an admission where the actual evidence introduced failed to establish any wrongdoing on his part and where his voluntary testimony on this point might be viewed as a waiver of his objection to its admission in evidence.

4 Eric Paul, counsel for Complainant: "I will present testimony through [David Breen] and Mr. Perryman with respect to the validity of the findings." (T.56).

UKC.5

Petitioner, the designated scapegoat, was never consulted, represented, or given an opportunity to rebut the accusations levelled at him *in absentia*. Because petitioner was never confronted nor given an opportunity to defend or explain hisconduct in the UKC case, the opinions of the parties and the findings made in the consent order are not competent evidence in this case.

Beyond the unsubstantiated opinions of Perryman and Breen and the unreliable hearsay (as to Heimann) of the UKC consent order, it is also important to analyze the actual evidence admitted in this case. Notwithstanding the innuendo raised by Perryman's testimony that there were some 25 to 30 similar inspection reports (T. 109), only one, CX 67, was introduced. Assuming, *arguendo,* that inferences are drawn from the inspection reports not offered or admitted in evidence in this case, those inferences should not exceed that which is proven by the one inspection report which was admitted. CX 67, viewed in light of all the evidence, does not prove or even suggest any wrongdoing on the part of petitioner. First, CX 67 relates to a load of apricots which were subjected to a U.S.D.A. inspection (RX. 32a) on December 30, 1987, nineteen days before the report on CX 67. On December 30, 1987, the apricots were found to have substantial condition defects. This is significant because there is no

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5 UKC accepted a thirty day suspension which did not affect the operation of the business for one day (T. 146-47); Perryman formed a new corporation, obtained a new PACA license, transferred the business operation to the new corporation, and was reimbursed for his expenses by United Fruit and Produce, the prior owner of UKC. (T. 58). By the time the suspension took effect, the suspended corporation was merely a shell.

evidence to suggest that the report signed by petitioner was not accurate in describing the January 18, 1988 condition of these problem apricots.

Second, petitioner clearly signed CX 67 with his name and entered the address of UKC, his employer. He did not forge the signature of a Kansas or federalinspector. It is ludicrous to suggest that petitioner signed his own name and business address in an effort to deceive Tom Lange Co. (the company which sold the apricots to petitioner at UKC) into believing that he was both a buyer for UKC and a State of Kansas inspector.

Third, there is no testimony which shows that CX 67 (or any other inspection reports not in evidence but allegedly signed by petitioner) was used to deceive or defraud any seller or that it was used for anything more than internal record keeping at UKC. Indeed, the Complainant flew in Bruce Rubin, the manager of Tom Lange Company and the person who dealt with petitioner at UKC (T. 183-84), and yet never even asked Mr. Rubin whether he thought that CX 67 was incorrect, whether it had been submitted to Tom Lange Company, or whether he thought Tom Lange Company had been cheated out of so much as a penny. Moreover, UKC never had to pay any money for reparations to any seller claiming to have been defrauded by the inspection reports. (T. 160-61).

The consent order was not consented to by the petitioner and "facts" stipulated by UKC in the consent order were inflammatory and irrelevant in this case against petitioner. Moreover, that the ALJ and Judicial Officer found the allegations against UKC to be the motive for petitioner's purported concealment of ownership at Royal -in spite of the absence of any

evidence that petitioner was aware of the complaint against UKC- is evidence of the extraordinary prejudicial effect this evidence had on petitioner's right to due process and a fair hearing.

> II. So many findings were made and inferences drawn which are unsupported or contradictory to the evidence so as to make an overwhelming showing that petitioner was not afforded the fundamental due process to which he is entitled.

In the administrative appeal in the U.S.D.A., petitioner raised twenty-four findings made and inferences drawn by the Administrative Law Judge which were unsupported by the evidence. On review, the Judicial Officer affirmed the ALJ on every point. While petitioner agrees that this blanket affirmation by the Judicial Officer does not prove a lack of objectivity, a review of the record as relates to a number of these findings does establish that petitioner was not afforded a fairhearing.6

> Robert Heimann signed a (many) bogus `State of Kansas Inspection Form(s),' but has yet to give a plausible reason, or any reason at all, for how his signature got on the form(s), in the UKC proceedings. (D&O p.48; 59a).

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6 In the sake of brevity, Appellant will not analyze all twenty-four points in this brief. However, by omitting discussion of these points, Appellant does not concede the arguments it raised in the U.S.D.A Appeal Petition.

The Judicial Officer later wrote at length supporting the inference drawn against petitioner for failing to deny the inspection report allegations. (T. p.83-4). At the hearing, petitioner was presented with a Hobson's choice. Either he could testify after the numerous objections to the admission of this testimony and risk these other acts becoming even a greater feature of the hearing or, alternatively, try to minimize the inflammatory effect these unrelated charges were having on the hearing. Petitioner should not be punished for making the "wrong" choice.7

The USDA seeks this Court's stamp of approval, as meeting minimum due process standards, for a hearing by smear and innuendo which would make JosephMcCarthy proud. The petitioner recognizes the scarcity of cases which deal with the fundamental fairness in the conduct of administrative hearings. Nevertheless, Federal Courts have recognized the right of parties to administrative proceedings to "a fair, unbiased, and impartial hearing." *Local No. 3, United Packinghouse Workers v N.L.R.B.*, 210 F.2d 325 (8th Cir. 1954).

Indeed, in *United Packinghouse*, the Eighth Circuit quoted the Fifth Circuit at length:

> **. . . a fair trial by an unbiased and nonpartisan trier of facts is of the essence of the adjudicatory process as well as when the judging is done in an administrative**

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7 It is important to note that counsel for the Department never asked Robert Heimann to admit or deny the UKC examination.

> **proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the results applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency have been relaxed. Nor will the fact that an examination of the record shows that there was evidence which would support the judgment, at all save a trial from the charge of unfairness, for when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains through the whole proceeding. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand. *N.L.R.B. v. Phelps*, 136 F.2d 562(5th Cir. 19__).**

The analysis of the Eighth Circuit in United Packinghouse precisely tracks the analysis which the petitioner asks this Court to make here. In United Packinghouse, the Court observed that:

> **the trial examiner found the evidence insufficient to sustain [a]. . . charge. He did so by discrediting the positive testimony in many cases and by crediting the negative testimony of the employee.**

United Packinghouse at page 329.

> In the instant case, the Judicial Officer wrote:
>
> > Robert S. Heimann has the least credibility. . . for a number of reasons. Primary to me is the fact that Robert S. Heimann walked away from The Gilbert Corporation proceedings in the 1970's. . . . (D&O p.48; 59a)
> >
> > I am completely convinced that Robert S. Heimann was intimately involved in every management decision at Royal, and my belief is buttressed by the lack of credibility I give to the witnesses claiming to have made vital decisions. (D&O p.60; 73a)

The analysis in *United Packinghouse* is equally applicable here:

> > The uniformity with which the examiner credited the negative testimony offered on behalf of the strikers and discredited the positive testimony offered on behalf of the employer regardless of the fact that the evidence of theemployer was corroborated in most instances by the surrounding facts and circumstances, convinces us of his bias and hostility.

United Packinghouse at 329.

> In the instant case, the Judicial Officer affirmed

every one of the twenty-five findings of the Administrative Law Judge which the petitioner demonstrated was unsupported by or inconsistent with the evidence. Yet the petitioner's claim that an investigator of the USDA fabricated testimony at the hearing was ignored by both the Administrative Law Judge and the Judicial Officer. (See Appellant's Initial Brief, page 24, footnote 8).

Again, as the Court reasoned in United Packinghouse:

> **The manifest prejudice, bias and hostility of the examiner as disclosed by an examination of the record goes far to weaken or destroy the presumption of correctness usually attributed to the findings of the trier of facts.**

***United Packinghouse* at page 330.**

As the Ninth Circuit stated in *Stivers v. Pierce* 71 F.3d 732,741 (9th Cir. 1995).

In attempting to make out a claim of unconstitutional bias, a plaintiff... ...must show that the adjudicator has prejudged or reasonably appears to have prejudged an issue.

It is clear from the Decision and Order in this case, that both the ALR and the Judicial Officer prejudged the petitioner's guilt based on irrelevant evidence regarding petitioner's involvement with United KC, and Gilbert Brokerage. An examination of the hearing afforded petitioner and the Decision and Order entered thereon

raises a serious question of fairness in the mind of any reasonable person.

CONCLUSION

For the various reasons outlined above, petitioner was deprived of his constitutional right to a fair hearing. This Court is now presented with the opportunity to correct the erroneous decisions of the lower courts. The petition for certiorari should be granted.

Respectfully submitted,

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EIGHTH CIRCUIT COURT OF APPEALS
No. 95-3552

Midland Banana & Tomato Company, Inc.; Robert S. Heimann; Susan Heimann,

Petitioners,

v.

On Petition for Review of a Decision of the United States Department of Agriculture

United States Department of Agriculture,

Respondent.

Submitted: November 22, 1996

Filed: January 7, 1997

Before RICHARD S. ARNOLD, Chief Judge, MAGILL, Circuit Judge, and SACHS,(*) District Judge.

SACHS, District Judge

(*)The Honorable Howard F. Sachs, United States District Judge for the Western District of Missouri, sitting by designation.

This petition for review stems from consolidated Department of Agriculture disciplinary proceedings under the Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499a et seq. (PACA), as amended, in which petitioner Robert Heimann was found to have committed repeated violations of the Act by failing to make full and prompt payment for purchases of agricultural commodities and by making false and misleading statements on a PACA application. Heimann asserts that he was deprived of due process because the Department procedures were tainted by irrelevant, prejudicial evidence which biased the decisionmakers and because there was blanket adoption of adverse claims, unsupported by evidence. We conclude that Heimann's contentions are lacking in support, and we affirm.

I.

The Perishable Agricultural Commodities Act was enacted to regulate the marketing of fresh and frozen fruits and vegetables in interstate commerce. See H.R. Rep. No. 87-1546 (1962), reprinted in 1962 U.S.C.C.A.N. 2749. Under the Act, all commission merchants, dealers and brokers in the perishable commodities industry are required to be licensed by the Department. 7 U.S.C. §§ 499c. All are subject to the Act, which declares certain conduct by commission merchants, dealers and brokers to be unlawful.

On August 25, 1993, the Director of the Fruit and Vegetable Division of the Agricultural Marketing Service, an agency within the Department of Agriculture,

commenced a disciplinary proceeding against Royal Fruit Co., Inc. ("Royal") for alleged willful repeated and flagrant violations of Section 2(4) of the Act, 7 U.S.C. §§ 499b(4), which makes it unlawful for any commission merchant, dealer or broker licensed under the Act to fail to make full and prompt payment in connec-tion with any transaction in interstate commerce involving perishable agricultural commodities. On the same day, the Director commenced a disciplinary proceeding against Midland Banana & Tomato Co., Inc. ("Midland"), alleging that Midland violated Section 8(c) of the Act, 7 U.S.C. §§ 499h(c), which makes it unlawful for a PACA license applicant to make any false or misleading statements in a license application. The complaints against both companies alleged that both entities were "alter egos" of Robert Heimann, making Heimann individually responsible for the alleged violations.

The Royal and Midland cases were consolidated and on July 26, 1994, following a hearing, an administrative law judge (ALJ) found that Royal committed willful, flagrant, and repeated violations of the Act by failing to make full and prompt payment of over $500,000; that Royal was the alter ego of Heimann; that Midland had violated the Act by making false and misleading statements in its application for a PACA license; and that Midland was Heimann's alter ego.

Heimann (the only party now before us) appealed to the Department's Judicial Officer,[1] challenging the

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[1] The Secretary has delegated final administrative authority to the Judicial Officer to decide cases subject to 5 U.S.C. §§§§ 556 and 557. 7C.F.R. §§ 2.35.

alter ego determinations in both cases. On August 16, 1995, in a lengthy and thorough opinion, Judicial Officer Donald A. Campbell adopted, with modifications, the ALJ's decision. This appeal followed.

.II.

In 1988, Robert Heimann purchased Royal, then a sole proprietorship, in an agreement that provided for Jeffrey Heimann, Robert's son, and Joseph Cali to manage the business.[2] Robert Heimann and his wife Beverly signed the contract for Royal's sale as purchasers. There is no evidence Robert Heimann ever gave or sold the business to Jeffrey Heimann or Joseph Cali.

Royal was licensed by PACA, however, as a partnership whose partners were identified as Joseph Cali, Jeffrey Heimann and Beverly Heimann. On November 21, 1988, Royal was incorporated and issued a new PACA license reflecting its corporate status. The listed directors, officers and shareholders were Cali, Jeffrey Heimann and Beverly Heimann. The license was terminated on December 1, 1992, due to Royal's failure to pay the required annual renewal fee

In May 1989, Robert Heimann became a consultant for Royal. Heimann's $10,000 per month fee was paid to Continental Oil & Gas Corp. ("Continental"), a non-operating entity Robert Heimann owned. After Robert Heimann formally joined the firm,

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[2] Cali's role at Royal is referred to in related litigation. Conforti v. United States, 74 F.3d 838, 840-1 (8th Cir. 1996).

Royal's business increased substantially. In December 1989, Royal purchased a new, larger location. The funds for this purchase and for improvements to the property were provided through a Small Business Administration loan secured by a mortgage on Robert and Beverly Heimann's personal residence. The lenders took Robert Heimann's management experience into account when deciding to approve the loan.

Robert Heimann was actively involved in Royal's management. He negotiated the purchase and sale of produce and arranged for its transportation. He appeared, to individuals dealing with the company, to be the person in charge of Royal's operations. Royal carried a "key man" life insurance policy on Robert Heimann and not on any other Royal employees.

When Royal began experiencing financial difficulties at the end of 1991, Robert Heimann allowed Royal to reduce his consulting fee to help keep the business solvent. During the first few months of 1992, Robert Heimann, through checks from Continental, provided Royal with a number of short-term, interest-free loans to cover Royal's checking account when Royal needed to pay suppliers quickly.

Between July 1992 and November 1992, Royal failed to make prompt payment to 21 sellers for produce purchased in the amount of $500,370.54. Royal ceased operations on November 17, 1992. That same day, Midland was incorporated. Midland's PACA license application identified Susan Heimann, Robert's daughter, an inexperienced college student, as its sole officer, director and shareholder. The funds used for Midland's initial capitalization came primarily from two of Robert

Heimann's friends. Susan Heimann invested $500 in the firm. Robert Heimann served as general manager and was essentially responsible for all aspects of the operation.

Midland and Royal had almost identical operations. Midland had the same address, telephone and facsimile numbers as Royal. It used Royal's office and warehouse equipment. It had the same customers as Royal and retained approximately one-third of Royal's employees.

Midland's PACA application asserted that Midland was not a successor to another firm. The Judicial Officer found, however, that Midland had succeeded Royal. He further found that Midland, in its application, had falsely denied that any employee had been the owner of a firm whose license is under suspension. The Judicial Officer found that the license of Gilbert Brokerage Co., a company Robert Heimann had owned and operated in the 1970s, was under "ongoing suspension." He additionally found the Midland application to be misleading because it concealed the identity of the true principal of the firm, Robert Heimann.

In concluding that Royal and Midland were alter egos of Robert Heimann, the Judicial Officer considered the witnesses' credibility to be critical. He found that the testimony of Robert, his family members, and Joseph Cali, was not credible. In so finding, he pointed to the fact that each of these individuals had misled authorities during the Department's investigation of the case. He concluded that Robert Heimann had the least credibility. To support this determination, he noted that Heimann

had walked away from Gilbert Brokerage's disciplinary proceedings without producing required documents, had signed a number of fraudulent "State of Kansas Inspection Forms" while associated with another produce company, United KC, in the 1980s, and had structured a number of transactions in a misleading manner, apparently in order to avoid financial responsibility. The Judicial Officer also found that Heimann's malfeasance prior to his involvement with Royal and Midland was relevant to the proceedings because it provided a motive for Heimann to disguise his true role in Royal's and Midland's operations.

Heimann asserts that consideration of these misdeeds was improper and tainted the opinions so that the ALJ and Judicial Officer were no longer neutral, unbiased decisionmakers. In support of this claim, Heimann contends the Judicial Officer uniformly credited the Agricultural Marketing Service position, even where the Department's findings were, he alleges, unsupported by or inconsistent with the evidence.[3] As a result, Heimann argues, he was not afforded the fundamental due process to which he is entitled.

III.

We review federal constitutional questions de novo. United States v. Bates, 77 F.3d 1101, 1104 (8th Cir. 1996). Our determination is limited to whether introduction of the allegedly irrelevant evidence so

[3] The contention is unsound. For example, there was a rejection of contention that Jeffrey B. Heimann was the alter ego of Midland and that the payment of bills through Continental amounted to check-kiting.

prejudiced the Secretary that Heimann was denied the fundamental fairness required in administrative hearings by the due process clause of the Fifth Amendment. See Beef Nebraska, Inc. v. United States, 807 F.2d 712, 719 (8th Cir. 1986), quoting Silverman v. Commodity Futures Trading Commission, 549 F.2d 28, 33 (7th Cir. 1977).

This court has recognized the right to "a fair, unbiased, and impartial" administrative hearing. Local No. 3, United Packinghouse Workers v. NLRB, 210 F.2d 325, 330 (8th Cir. 1954), cert. denied, 348 U.S. 822 (1954). Heimann considerably overplays his hand by suggesting that any uniform adoption of one party's proposed findings signifies "bias" and supports a conclusion that there has been a due process violation.[4] Heimann's argument relies on NLRB v. Miami Coca-Cola Bottling Co., 222 F.2d 341, 345 (5th Cir. 1955), in which the court stated that such a practice by a trial judge or hearing examiner "deprives his credibility findings of the weight usually afforded them." We agree that signs of superficial analysis invite closer scrutiny of the proceedings below; but this does not routinely or usually result in a reversal, much less a conclusion that there has been a violation of constitutionally mandated procedures.

There are occasions when the correct result is so obvious that a trial judge or hearing examiner may be less than completely thorough in express analysis. As we have observed, this did not occur here.

We are not compelled by petitioner's briefing to address whether the challenged evidence was properly admitted. Heimann simply assumes, without citation,

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[4] Occasional wording in the 122-page opinion that suggests irritation was fairly induced by the evidence.

that the evidence was inadmissible. Additionally, because Heimann's sole argument on appeal is that he was denied due process, we need not analyze the Secretary's findings under the "substantial evidence" test. We note, however, that we are satisfied the Secretary's decision was well supported by substantial evidence and believe the challenged evidence was admissible, at least to show

While it is thus not necessary to determine whether the pyoceedings before the Department were error-free, we note that the Department successfully responds to two claims of error that are emphasized before us. With respect to whether Heimann was still under a cloud because of the Gilbert Brokerage affair in the 1970s, he contends there was a two-year limit on the suspension because of the failure to pay suppliers. The Department contends, however, that there was an "ongoing suspension" pursuant to 7 U.S.C. §§ 499m(b) (last sentence) because Heimann never produced that company's records, and that such a suspension remains until and unless the records are produced. As the Judicial Officer concluded, Heimann had "good reason to worry" that the Gilbert Brokerage experience would prejudice a new application in his own name.

With respect to his personal falsification of inspection certificates during the United KC activities, proof of such conduct was made in this case and Heimann simply declined to meet the issue, although he could have done so without waiving his claim of irrelevance.

Nothing has been presented that would approach a denial of Heimann's right to due process.

Accordingly, we affirm the decision of the Secretary.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re: PACA Docket No. D93-548

Midland Banana & Tomato Co.,
Inc., Susan E. Heimann,
Robert S. Heimann, and
Jeffrey B. Heimann,

Respondents

AND

In re: PACA Docket No. D-93-549

Royal Fruit Co., Inc., and
Robert S. Heimann,

Decision and Order as to Midland Banana & Tomato Co.,
Inc., Susan E. Heimann, and Robert S. Heimann

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Preliminary Statement and Rulings on Motions

These are consolidated disciplinary proceedings under the Perishable Agricultural Commodities Act, 1930, as amended (PACA) (7 U.S.C. § 499a *et seq.*),[1] in which Administrative Law Judge Edwin S. Bernstein (ALJ) filed an Initial Decision and Order on July 26, 1994, finding in No. D-93-548 that Respondents Midland Banana & Tomato Co., Inc., Susan E. Heimann, and Robert S. Heimann made false and misleading statements on Midland's PACA application, in violation of section 8(c) of the PACA (7 U.S.C. § 499h(c)), and that Midland's license should be revoked. The ALJ, however, found insufficient record evidence in No. D-93-548 that Respondent Jeffrey B. Heimann was the *alter ego* of Midland, and dismissed the Complaint against him.

In No. D-93-549 the ALJ found that Respondents Royal Fruit Co., Inc., and Robert S. Heimann committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly for purchases of perishable agricultural commodities in interstate and foreign commerce.

On September 29, 1994, Respondents Midland Banana & Tomato Co., Inc., Susan E. Heimann, and Robert S. Heimann (in No. D-93-548), and Robert S. Heimann (in No. D-93-549) appealed to the Judicial Officer, to whom

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[1] *See generally* Campbell, *The Perishable Agricultural Commodities Act Regulatory Program,* in 1 Davidson, Agricultural Law, ch. 4 (1981 and 1989 Cum. Supp.), and Becker and Whitten, *Perishable Agricultural Commodities Act,* in 10 Harl, Agricultural Law, ch. 72 (1980).

final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ *556* and 557 has been delegated (7 C.F.R. § 2.35).[2] Respondents' appeal also requested oral argument, which is discretionary (7 C.F.R. § 1.145(d)); but, this request is denied, in light of the extensive briefs filed in this consolidated proceeding, and my conclusion that very little would be gained from oral argument. The cases of the two Respondents who did not appeal are now final.[3] On October 31, 1994, Complainant

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[2] **The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c450g), Reorganization Plan No.2 of 1953, 18 Fed. Reg. 3219 *(1953), reprinted in* 5 U.S.C. app. at 1280 (1988), and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (Pub. L. No.103-354, § 212(a)(1), 108 stat. 3178, 3210 (1994)). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).**

[3] **As specifically set forth in my "Clarification of Informal Order of August 26, 1994," filed September 12, 1994, at 1-2:**

> **Respondent Royal Fruit Co., Inc., in PACA Docket No. D-93-549, and Respondent Jeffrey B. Heimann, in PACA Docket No. D-93-548, did not request an extension of time to file an appeal, and the Decision filed July 26, 1994, became final as to these Respondents on September 2, 1994, 35 days**

filed "Complainant" Response to Appeal Petition." On November 7, 1994, the consolidated case was referred to the Judicial Officer for decision.

On August 16, 1994, Petitioners Joseph Cali and Jeffrey B. Heimann filed a document in No. D-93-549 entitled "Petition to Intervene and for Entry of Order Against Royal Fruit Co., Inc., *nunc pro tunc."* Petitioners are listed on Royal Fruit's PACA license as officers, shareholders and directors. Being thus (statutorily) responsibly connected to that Respondent, Petitioners sought specific relief from PACA's allegedly

unfair regulatory machinery. On August 24, 1994, the ALJ denied the Petition on the merits. On September 26, 1994, Petitioners appealed the ALJ's denial to the Judicial Officer. (Complainant filed timely objections to both the Petition and the appeal on August 18, 1994, and October 31, 1994, respectively.)

I affirm the ALJ's denial of the August 16, 1994, Petition, for the following reasons. PACA Docket No. D-93-549 is a formal adjudicatory proceeding governed by Rules of Practice that appear at 7 C.F.R. §§ 1.130-.151. No provision is made for intervention by third parties under these Rules of Practice. The only parties to such proceedings are the Complainant, which is the party instituting the proceeding (7 C.F.R. § 1.132(b)) and the Respondent (or Respondents), which is the party or parties proceeded against (7 C.F.R. § § 1.132(c),. 130). In other proceedings, where third parties may reasonably be anticipated to have an interest, such as reparation

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after service on July 29, 1994. The Order shall take effect on September 16, 1994.

proceedings under the Perishable Agricultural Commodities Act, the applicable Rules of Practice there expressly provide for intervention upon a showing of good cause. See 7 C.F.R. § 47.12. The interests of responsibly connected parties, however, are intended to be addressed in responsibly connected proceedings and not by intervention in formal adjudicatory proceedings. *In re Bananas, Inc.*, 42 Agric. Dec. 426 (1983). *See also In re Syracuse Sales Co.* (Decision as to John Knopp), 52 Agric. Dec. 1511, 1513 (1993), *appeal dismissed,* No. *94-9505* (10th Cir. Apr.29, 1994).

However, had the Petitioners' intervention not been barred by the Rules of Practice, I would have affirmed the ALJ's denial on the merits, for the reasons set forth in the ALJ's August 24, 1994, ruling, and in Complainant's two replies, *supra,* which I also would have adopted as my own.

Respondents' motion to strike Complainant's response to Respondents' appeal (Nov. 8, 1994) is denied. Respondents' opposition to Complainant's motion for an extension of time (Oct.21, 1994, by Fax) is denied.

Based upon a careful consideration of the entire record, the Initial Decision (in both D-93-548 and *D-93-549)* is adopted as the final decision, with deletions shown by dots, changes or additions shown in brackets, and trivial editorial changes not specified. Additional Conclusions by the Judicial Officer follow the ALJ's Discussion.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

These are consolidated proceedings instituted pursuant to the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. § 499a *et seq.* (the "Act" or "PACA"), by Complaints filed on August *25,* 1993, by the Director of the Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture ("USDA").

The Complaint in PACA Docket No. D-93-549 alleges that Respondent Royal Fruit Co., Inc. ("Royal"), under the direction, management and control of Robert S. Heimann, willfully violated section 2(4) of the Act (7 U.S.C. § 499b(4)) by failing [to] make full payment promptly to 21 sellers for 97 lots of produce totaling $500,370.54.

The Complaint in PACA Docket No. D-93-548 alleges that the license application of Respondent Midland Banana & Tomato Co., Inc. (Midland), contained false and misleading statements with respect to the history and management of the corporation and was therefore wrongfully obtained.

Respondents in the disciplinary proceeding against Royal admit the failure to pay for produce, but deny that Robert Heimann was an owner or responsible for the direction, management or control of Royal. Respondents in the Midland proceeding essentially deny all material allegations. The cases were consolidated by Order filed on November 3, 1993.

I presided over a hearing on March 22-24, 1994, in Kansas City, Missouri. Complainant was represented by Eric Paul, Esq., Office of the General Counsel, United States Department of Agriculture. Respondents were

represented by Richard L. Katz, Esq., of Coral Gables, Florida. Complainant's exhibits are referred to as "CX"; Respondents' exhibits are referred to as "RX"; and the hearing transcript is referred to as "Tr." The parties filed proposed findings of fact, proposed conclusions of law and briefs, with the last being filed on July 7, 1994. All proposed findings, proposed conclusions, and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence.

Findings of Fact

1. Robert S. Heimann is an individual currently residing at 10303 Howe Lane, Leawood, Kansas 66206. (Answer). Mr. Heimann has been involved in the produce business for over 30 years (CX 18, []p. 7[-8]), and is currently employed with Gallo Produce and Food Products, Inc., in Kansas City, Missouri. (Tr. 373). Robert Heimann and Beverly Heimann are husband and wife. (Tr. 386[, 633]).

2. Robert Heimann owned and managed a produce brokerage known as the Gilbert Corporation in the mid-1970's[; the license of which was "pulled" and which still owed at least *$50,500* in reparations, when Robert S. Heimann lost track of the Gilbert situation. Robert S. Heimann is under ongoing suspension from his refusal to produce Gilbert's records for a disciplinary proceeding; and, he likely still owes these reparations]. (CX 18, [p]p. 6[-7; Tr. 617-18]).

3. Jeffrey B. Heimann is an individual currently residing in Key Largo, Florida (Tr. *580),* and was first employed in the produce business beginning in 1988 at Royal Fruit Company [when he "was just out of college" (Tr. 386)].

Prior to that time, he was employed at the investment firm of Dean Witter in Phoenix, Arizona. (Tr. 581). Jeffrey Heimann is the son of Robert arid Beverly Heimann.

4. Susan E. Heimann is an individual residing at 946 Tennessee, Lawrence, Kansas, and is currently a full-time college student at the University of Kansas, in Lawrence, Kansas. (Answer; Tr. 463-64). Susan Heimann is the daughter of Robert and Beverly Heimann and sister of Jeffrey Heimann.

5. On October 13, 1988, PACA License No.890046 was issued to Royal Fruit Co., 313 Main Street, Kansas City, Missouri *64105,* a partnership whose partners were identified on the license as being Joseph Cali, Jeff Heimann, and Beverly Heimann. (CX 2, p.5). On November 21, 1988, a certificate of incorporation was issued to Royal Fruit Company by the State of Missouri. (RX 1, p.1).

6. Following the submission of a license renewal application showing the change from a partnership to a corporation (CX 2), PACA License No.900296 was issued to Royal Fruit Co., Inc., on January 1, 1989. (CX 1). The license was terminated on December 1, 1992, pursuant to section 4(a) of the Act (7 U.S.C. § 499d(a)), when Royal failed to pay the required annual renewal fee. (Answer). At the time of the license termination, Royal had relocated to 303 Grand Avenue, Kansas City, Missouri 64106. (CX 1, p.2).

7. The Heimann family first became involved with Royal in 1988, when Robert Heimann was associated with United K.C., Inc. ("UKC"), another produce firm in the

Kansas City area. ([CX 60;] Tr. 633-34). Mr. Heimann was approached by Louis Ribaste, who at that time was the owner of Royal, about the possible purchase of Royal on behalf of Mr Heimann's employer, UKC. (Tr. 633-34). When it became apparent that UKC was not interested in the purchase of Royal, one of Robert Heimann's coworkers at UKC, Joe Cali, expressed an interest in Royal. (Tr. 379, 634-35). Mr. Cali and Robert Heimann' s son, Jeff Heimann, who at that time was a stockbroker in Phoenix, Arizona, but who was anxious to embark on a more lucrative career (Tr. *582*-84, 635), wanted to operate Royal as partners. (Tr. 379, *585-86, 635-36).*

8. Because Mr. Ribaste perceived Jeff Heimann and Joe Cali to be relative newcomers to the produce business, he was reluctant to sell Royal to them. [In fact, "Jeff was just out of college and I was 21 or 22 years old," as Joe Cali testified (Tr. 386).] Instead, he agreed to sell Royal to Robert Heimann, and Jeff Heimann and Joe Call would manage the business. (Tr. 230-32, 585-86, 635-36).

9. The contract for the sale of Royal for a total price of $114,587.21, dated July 8, 1988, was entered between Louis Ribaste and Robert and Beverly Heimann, and required periodic payments of $15,000. (CX 60).

10. Jeff Heimann and Joe Cali did not utilize any of their own funds in the purchase of Royal. (CX 17, p.10).

11. On January 3, 1989, Jeff Heimann, Joe Cali, and Beverly Heimann applied for and received a Small Business Administration (SBA) loan in the amount of $125,000 in order to pay Mr. Ribaste in full. (CX 15; Tr. 586-587). The purpose for including Beverly Heimann as a partner on the loan application was to increase the

chances of approval, since, as a woman, Mrs. Heimann was considered a "minority" by the SBA. (CX 17, p.6; Tr. 386, 586-87). [Jeffrey B. Heimann admitted in related litigation that "Beverly never had an active interest in Royal Fruit Company. I guess for the record the reason why Beverly was ever even involved per se as a vice-president, we used her to help get an SBA loan. We needed a minority, but she never really had an active part with Royal Fruit Company. She was just a name.... She was something that was just on a piece of paper." (CX 17, p.6.)]

12. In 1988, during its first year of operation, Royal reported gross revenues of $1,066,275 and a profit of $14,384. (RX 3).

13. When Royal was incorporated on November 21, 1988 [(the Articles of Incorporation provided for three directors (RX 1, pp.1, 7)),] Joe Cali, Beverly Heimann, and Jeff Heimann were [nominated and unanimously elected the three directors, as reported in the "Minutes of the Organization Meeting of Incorporator of Royal Fruit Company," dated November 22, 1988 (RX 1, pp.32-33)].... the "Minutes of First Meeting of Board of Directors of Royal Fruit company," November 22, 1988, stated that they were] directors and equal shareholders,... each receiving 10,000 shares of Royal common stock. (CX 13; RX 1[, 36, 44]). The minutes of the first meeting of directors on November 22, 1988, [also] reflect that Joe Cali' Beverly Heimann, and Jeff Heimann were elected to serve as president, vice president, and secretary/treasurer, respectively. (RX 1, p.35).

14. Beverly Heimann did not participate in the management or control of the business. ([Finding 11;] CX

17, p.6). She did not receive compensation for her role as vice president of Royal. (RX 1, p.36).

15. Royal noted in its 1991 tax return that the Beverly Heimann's shares were retired on or about January 2, 1991. (CX 19, p.17). The "Shareholder's Share of Income, Credits, Deductions, etc." (Schedule K-i) reflect for the tax year 1991 that Beverly Heimann did not own any shares of Royal stock (CX 19, p. 14[, 1. A]), and that Joe Cali and Jeff Heimann each owned 50% of Royal's outstanding stock. (CX 19, pp. 10, [1. A,] 12[, I. A, respectively]). The stock records of Royal do not reflect that the shares of Beverly Heimann were retired.[4]

16. The 1991 K1 Schedules also reflect that Jeff Heimann and Joe Cali each received $24,196 in property distributions, while Beverly Heimann received $46,463 in property distributions. (CX 19, pp.11, 13, 15).

17. While Robert Heimann was employed at UKC, he sold ["poor quality"] produce to Royal on an "open [billing]" basis, (also known as "on consignment" and "price after sale,"] an industry practice whereby the price for ["distressed"] produce a seller has shipped to a purchaser is not set until the purchaser receives the ["inferior" or "salvage"] product. (Tr. 100-01, 117-19, (120-21,] 131-32, 636).

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[4] Citation omitted, because, while the documents cited are copies of the Royal Fruit Company stock certificates, issued November 21, 1988, to Beverly Heimann, Jeffrey Heimann, and Joe Cali, they do not address whether Beverly Heimann's shares were actually retired.]

18. In May 1989, when UKC was in the process of changing ownership, Robert Heimann's employment contract at UKC expired and it was agreed with the new owner that his contract would not be renewed. (Tr. 380, 628-630). Robert Heimann became a consultant for Royal, with his fee, $10,000 per month, paid to Continental Oil [& Gas Corporation] . . . ("Continental"), a venture he owned. (CX 18, p.5; Tr. 593-95, 630). [Continental was located in Robert S. Heimann's home, was not incorporated, and had no oil or gas operations or activities during the pertinent time period; but, was just "Robert Heimann, d/b/a" Continental Oil & Gas Corporation. (CX 18, p. 5--deposition of Robert Heimann in a related lawsuit). UKC also had paid Robert Heimann as a consultant, through Continental.]

19. Subsequent to the departure of Robert Heimann, UKC was found in a Consent Decision issued on June 11, 1990 (PACA Docket No. D-90-5 13), to have violated section 2(4) of the Act by issuing false and misleading documents to its suppliers to justify dumping and/or adjusting the price for fruits and vegetables that it received. (CX 64, [p]p. 4-7). The decision included a finding that the false and misleading documents (inspection certificates) were "designed and prepared by Bob Heimann, who was the General Manager of United K.C., Inc., during the time in which the subject violations took place." (CX 64, p.5) [(See Respondents' allegedly *"unsupported finding no.17," infra.)]* Although he testified at the hearing (in the case, sub *judice],* Robert Heimann did not deny his alleged involvement in the false inspection certificate scheme at UKC [(Tr. 613-54)].

20. After Robert Heimann joined the firm in May 1989, Royal's business increased substantially with the

addition of tomato accounts and short business with grocery chain warehouses. (Tr. 609-10). During 1989, the year in which Robert Heimann was hired, Royal reported $3,430,287 in gross revenues and $70,049 in profits. (RX 5).

21. In December 1989, Royal purchased a new, larger location, at 303 Grand Avenue. (CX 61; RX 14, p.164; Tr. 382-83, 589-92). The funds for the purchase price and improvements to the property were provided through another SBA loan in the amount of *$525,000,* secured by the assets of Royal and personal guaranties of Robert and Beverly Heimann, Joe Cali, and Jeff Heimann. (CX 16, 61).

22. The loan was also secured by a [third] mortgage on the personal residence of Robert and Beverly Heimann. (CX 61, p.8). The home was represented as having a value of $350,000 and was subject to... [a first] mortgage[] in the .. . amount of $210,000 [and a second mortgage of $50,000]. (CX 61, pp.8, 28).

23. The produce industry expertise and management experience of Robert Heimann were taken into consideration by the lenders in the decision to approve the loan. (CX 61, pp.39-41).

24. Royal reported revenues of $6,941,626 and profits of *$56,733* for 1990. (RX 6). In 1991, Royal reported sales of $10,674,024 and a $346,184 loss. (RX 7).

25. Robert Heimann was actively involved in the direction and management of Royal [(CX 70)].

26. At the end of 1991, when Royal began to experience financial difficulty, Robert Heimann (thought of the idea which] allowed Royal to reduce his consulting fee by *50%* [and] to (become an employee at] *$5,000* per month in order to help keep the business solvent. (CX 17, p.54; Tr. 637-38).

27. In 1992, Royal experienced major inventory losses due to a cooler compressor failure [but was in financial trouble before then]. (CX 18, p.9).

28. During the first three months of 1992, Royal received a series of at least 42 short-term, interest-free loans from Robert Heimann via checks from Continental Oil Company. (CX 21-23, 68; Tr. 596-600). During this three-month period, over 1.8 million dollars flowed from Continental to Royal. (CX 21-23). The purpose of the loans was to cover Royal's checking account at the local bank when Royal needed to pay its suppliers quickly. (CX 18, p.9; Tr. 391, 596-99). When an out-of-town purchaser paid Royal for produce, Royal's bank would not credit the Royal account until three to ten days after the out-of-town check was deposited, whereas a check to Royal from Continental, drawn on a local bank, was credited to Royal's account on [the] same or next day after it was deposited. (Tr. 598-99). When Continental made these loans to Royal, Jeff Heimann would often give his father a Royal check in repayment for the loan on the same day; however, Robert Heimann would not deposit the Royal repayment in Continental's account for a few days in order to allow adequate time for the out-of-town checks from Royal's customers to be credited to Royal's account. (Tr. 599-600). Royal was not required to pay interest on any of the loans. (CX 18, p.9; Tr. 600).

29. During early 1992, three checks totalling $30,000 were issued by Royal, made payable to Continental Oil, for which there appears no corresponding deposit in Royal's account. (CX 21-23, 68; Tr. *335-36).*

30. Royal carried a $500,000 "key man" life insurance policy on Robert Heimann. (CX 17, p.47). The company did not have life insurance for any other employee. (CX 17, p.47).

31. On November 16, 1992, a Stipulation and Order for Preliminary Injunction was filed in the United States District Court for the Western District of Missouri, preserving Royal's PACA trust assets for the benefit of the plaintiff, Tom Lange Co., Inc., an unpaid produce vendor, and any other qualified PACA trust beneficiaries. (CX 7).

32. Counsel for the respective parties in the present matter stipulated at the hearing on March 22, 1994, that the amount left unpaid by Royal to the PACA trust creditors was $423,302.70. (Tr. *35-36).*

33. On November 9, 1992, Jeffrey Heimann distributed to Royal employees an announcement which stated that the company would cease operations effective

November 17, 1992. (CX 62). The announcement also stated that beginning November 18, 1992, "a new company, similar to Royal Fruit Co. will be leasing the building." and that the new company might possibly hire some of the Royal employees. (CX 62).

34. Midland Banana & Tomato Co., Inc., was incorporated on November 17, 1992, with an address of 303 Grand Avenue, Kansas City, Missouri 64106. (CX 27). Midland's PACA license application, dated November 23, 1992, identifies Susan Heimann as the sole officer, director, and shareholder. (CX 26, pp.2-6). PACA License No.930297 was issued to Midland on November 30, 1992, and was renewed in 1993. (CX 26, p.1; Tr. [538-]39).

35. Funds for the initial capitalization [$30,000] of Midland came in the form of loans from [two] friends of Robert Heimann. (CX 18, p.3). Susan Heimann testified that she also invested $500 in the firm. (Tr. 473).

36. Midland leased the facility at 303 Grand Avenue from Royal for $7,000 per month. (CX 17, p.7). The lease was negotiated and executed by Jeff Heimann on behalf of Royal and Robert Heimann [as manager] on behalf of Midland. (CX 17, p.7, CX 31). On August 2, 1993, Midland contracted to purchase the Royal facility for $435,000, an amount supported by an appraisal which had been requested by Robert Heimann. (RX 14-15). The SBA loan, with a principal balance due of $426,420.88 (RX 15, p.199), was assumed by Midland on August 19, 1993, under an agreement that provides for the continued liability of Robert and Beverly Heimann, Jeff Heimann, and Joe Cali. (RX 17).

37. Midland retained approximately one-third of Royal's 35 employees (CX 25, 37, 39).

38. Midland had the same telephone number and facsimile machine number as Royal. (CX 18, p.12). Employees at Midland did not begin to answer the

telephones as "Midland Banana & Tomato" until January 1, 1993. (CX 17, p.20). At some point in 1993, the telephone and facsimile numbers were changed. (Tr. 500).

39. Midland utilized Royal's office equipment (CX 17, p. 20), Midland assumed the lease on Royal's tomato wrapping machines (CX 17, p.20; RX 21), and used other Royal warehouse equipment such as jacks and two-wheelers. (CX 17, p.20).

40. Midland and Royal had many of the same customers. (CX 17, p.21; Tr. 380-82).

41. Robert Heimann served as the general manager of Midland , purchasing and selling virtually all of the produce (CX 18, pp.3-4), checking filing, paying bills, hiring and firing employees, arranging for transportation, maintaining inventory (CX 18, p.4, 14), inspecting produce (CX 18, p.1), and overseeing the day-to-day operations of the business. (CX 43).

42. Jeff Heimann was initially employed by Midland as a bookkeeper, then as a warehouse foreman, overseeing loads and supervising the packaging of tomatoes. (Tr. 487,) 603-07). Jeff Heimann was no longer employed by Midland as of July 1993. (Tr. 607).

43. On several occasions, Midland loaned funds to Robert Heimann and Jeffrey Heimann. Each of the loans has been repaid with the exception of a $10,000 loan to Robert Heimann. (CX 49-50; Tr. 501-02, 608).

44. Prior to becoming the sole officer and director of Midland, Susan Heimann's experience in the produce industry was limited to her work at the City Market

during weekends on a few occasions. (CX 17, p.19; Tr. 474). In connection with her duties at Midland, Susan testified that she made up to three trips from school in Lawrence to visit the facility for a total of approximately 15 hours a week. (Tr. 485-86). She did not receive a salary for her services as president and sole director of Midland. (Tr. 467).

45. Susan Heimann is dependent upon her parents for financial support for college tuition and living expenses. (Tr. 469-71).

46. Susan Heimann testified that, when Midland was formed, she intended for Robert Heimann to manage the business so she would have a place of employment upon graduation from college. (Tr. 475, *503-04).* (And, she further testified that] [t]he employment of Robert Heimann by Midland prevented her family from having to move to Florida, where her father had been offered a sales position. (CX 18, p.1; Tr. 476, 504, 639-40).

47. Midland has discontinued operations with respect to the purchase and sale of produce. (Tr. *502).*

[48. Midland, Susan Heim ann, and Robert S. Heimann made several false and misleading statements on Midland's license application form.]

Conclusions of Law

1. Respondents Royal Fruit Co., Inc., and Robert S. Heimann committed willful, flagrant and repeated violations of section 2(4) of the Act (7 U.S.C. § 499b(4)).

2. Respondents Midland Banana & Tomato Co., Inc., Susan E. Heimann, and Robert S. Heimann willfully violated section 8(c) of the Act (7 U.S.C. § 499h(c)).

3. Jeffrey B. Heimann did not violate the Act in connection with the activities of Midland Banana & Tomato Co., Inc.

Pertinent Statutory Provisions

[Section 1(6) of the PACA (7 U.S.C. § 499a(6)) provides:

(6) The term "dealer" means any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce. . .

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) provides:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce-

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in

respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title[.]

Section 4(a) of the PACA (7 U.S.C. § 499d(a)) provides:

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this tide, but said license shall automatically terminate on any anniversary date thereof unless the annual fee has been paid: *Provided,* That notice of the necessity of paying the annual fee shall be mailed at least thirty days before the anniversary date: *Provided, further,* That if the annual fee is not paid by the anniversary date the licensee may obtain a renewal of that license at any time within thirty days by paying the fee provided in section 499c(b) of this title, plus $5, which shall be deposited in the Perishable Agricultural Commodities Act fund provided for by section 499c(b) of this title: *And provided further,* That the license of any licensee shall terminate upon said licensee, or in case the licensee is a partnership, any partner, being discharged as a bankrupt, unless the Secretary finds upon examination of the circumstances of such bankruptcy,

which he shall examine if requested to do so by said licensee, that such circumstances do not warrant such termination.

Section 8(a) of the PACA (7 U.S.C. § 499h(a)) provides:

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

Section 8(c) of the PACA (7 U.S.C. § 499h(c)) provides:

If, after a license shall have been issued to an applicant, the Secretary believes that the license was obtained through a false or misleading statement in the application therefor or through a misrepresentation, concealment, or withholding of facts respecting any violation of this chapter by any officer, agent, or employee, he may, after thirty days' notice and an opportunity for a hearing revoke said license, whereupon no license shall be issued to said applicant or any applicant in which the person responsible for such false or misleading statement or misrepresentation, concealment, or withholding of facts is financially interested, except under the conditions set forth in section 499d(b) of this title.

Discussion

The PACA was enacted to regulate and control the handling of fresh fruits and vegetables. 71 CONG. REC. S2163 ([daily ed.] May 29, 1929). Passage of the PACA was brought about in response to the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers, and brokers. H.R. REP. No.1041, 71st Cong., 2d Sess. (1930).

The primary purpose of the PACA is to provide a practical remedy to small farmers and growers who are vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. *O'Day v. George Arakelian Farms, Inc., 536* F.2d *856* (9th Cir. 1976); *Chiasey V. Guenn,* 443 F.2d *584* (6th Cir. 1971). "Accordingly, certain conduct by commission merchants, dealers, or brokers is declared to be unlawfull." *O'Day, supra,* at 858. Enforcement is effectuated through a system of licensing with penalties for violations. H.R. REP. No.1041, 71st Cong., 2d. Sess. 3 (1930). *See also In re George Steinberg & Son, Inc.,* 32 Agric. Dec. 236 (1973), *aff'd sub nom. George Steinberg & Son, Inc.v. Butz,* 491 F.2d 988 (2d *Cir.), cert denied,* 419 U.S. 830 (1974).

By enacting the PACA, Congress also intended to establish bars to preclude all but financially responsible persons from engaging in the business subject to the Act. an act which is prohibited by a statute or if a person carelessly disregards the requirements of a statute. *In re HM. Shield,* Inc., 48 Agric. Dec. 573, 581(1989), *aff'd per curiam*, 893 F.2d 347 (11th Cir. 1989) (unpublished). Over the course of several months, Royal continued to

purchase produce in large quantities when it was unable to pay its suppliers; therefore, even under the stricter standard set forth in some circuits, *see, e.g., Capitol Packing Co. V. United States, 350* F.2d 67, 78-79 (10th Cir. 1965), the violations would still be willful in view of Royal's blatant disregard of express regulations requiring prompt payment.

Respondents argue that Robert Heimann was merely a salesman for Royal and, as such, cannot be held individually accountable for the failures to pay promptly, especially since the corporate records of Royal identify Jeffrey Heimann, Joe Cali, and Beverly Heimann as the sole officers, directors, and shareholders of the firm. I do not agree.

It is possible that many of the factors which tie Robert Heimann to Royal, if taken individually, could be explained away. However, when the totality of the circumstances is considered, the evidence with regard to the central role played by Robert Heimann in the affairs of Royal points to a much more intimate relationship-beyond that which Respondent maintains existed. I conclude that, beginning with Royal's acquisition and continuing until its eventual demise, Robert Heimann was a key figure in nearly every important aspect of the business.

Although the fact received relatively little attention at the hearing, I find it quite telling with respect to Robert Heimann's role at Royal that he executed (along with his wife, Beverly) the contract for the purchase of Royal from its original owner, Louis Ribaste. (CX 60, pp.2-9). The explanation given for this arrangement was that Mr. Ribaste was confident that Robert Heimann, with his

experience in the industry, would make good on his promise to pay, whereas Ribaste was unsure about Jeff Heimann and Joe Cali. (Tr. 231-32). Mr. Ribaste made his understanding of the transaction clear when he testified that "dollar-wise, I was looking to Bob Heimann for my $114,000, but Jeff [Heimann] and Joe [Call] were operators" who would initially run the firm. (Tr. 23[2]).

Respondents contend that Robert Heimann was merely a guarantor on the purchase of Royal and that Jeff and Joe were the true principals and owners. However, nothing in the contract for the sale of Royal indicates the existence of such an arrangement. (CX 60, [p]p. 2-9).

Conspicuous by its absence is any proof in the record indicating that... [ownership of] Royal ever passed from Robert Heimann to Jeffrey Heimann or Joe Cali. The document entered as CX 60, page 13, entitled "Ownership of Royal Fruit Company" does not change this assessment. The document, dated November 10, 1988, and signed by Robert Heimann, states in its entirety:

Initially, Bob and Beverly Heimann negotiated the purchase of the business. When the deal was closed, immediately thereafter, Mr. Heimann directed any and all responsibilities related to the company to Joe Cali and Jeff Heimann. The resultant effect was that on July 8, 1988, the day the business commenced, Joe Cali, Jeff Heimann, and Beverly Heimann, were equal partners in the business.

Even if this self-serving document were taken as true on its face, it merely recites the same facts as stated above by Mr. Ribaste, *i.e.*, that Robert and Beverly Heimann owned Royal, while Jeff Heimann and Joe Cali initially

managed it. There is no other evidence in the record with respect to how Jeff Heimann and Joe Cali came to own Royal or what consideration Robert Heimann received in exchange for his ownership interest. Indeed, Jeff Heimann once acknowledged that he and Joe Cali did not utilize any of their own funds in the purchase of Royal. (CX 17, p.10). Although the exhibits show that once Royal was incorporated, Jeff Heimann, Joe Cali, and Beverly Heimann each received one-third of the shares of the corporation, the question remains: how did they come to "own" Royal?

Royal applied for, and received, a $125,000 SBA-guaranteed loan in December 1988, for the purpose of paying the balance of the purchase price [$116,100] to Mr. Ribaste. (CX 61, *pp.2-5,* 31-35). In addition to the assets of the business and personal guaranties of Jeff Heimann and Joe Cali, the loan was secured by a personal guaranty of Beverly Heimann [and assignment of decreasing term life insurance in the amount of $125,000 on the lives of the shareholders]. (CX 61, p.4).

Beverly Heimann's actual participation, if any, in the operations at Royal was very limited. The Heimanns and Joe Cali acknowledged that the sole purpose of her presence as a "partner" on Royal's initial SBA loan was to assist in securing loan approval. (CX 17, p.6; Tr. 386, 586-587). While some testimony indicated that she provided early bookkeeping assistance (Tr. 386), other evidence showed that she was "just a name" and "something that was just on a piece of paper." (CX 17, p.6). She did not receive compensation for her role as vice president of Royal. (RX 1, p.36).

Continental.] Soon after Robert Heimann joined the firm, Royal experienced rapid growth in both its sales and its physical facilities. During its first year in operation-1988, while Robert Heirnann was still employed at UKC, Royal reported sales of $1,066,275 and profits of $14,384. (RX 3). In 1989, the year Robert Heimann began selling at Royal, sales of $3,430,287 and profits of $70,049 were reported. (RX 5).

Robert Heimann was also instrumental in securing adequate financing for Royal's expanding operations. In August 1989, Royal applied for, and eventually received, a $525,000 SBA-guaranteed loan for the purpose of acquiring and improving a large warehouse facility at 303 Grand Avenue in Kansas City. (CX 16, 61). An examination of the loan application documents reveals that the lenders considered the management expertise and the personal assets of Robert Heimann in the decision to approve the loan. (CX 61, pp. 3941). In the SBA document entitled "Lender Application for Guaranty or Participation," the analysis of Royal included the following comment with regard to "Management skill of the applicant": "Bob has been in this business for over 30 years as the history indicates. In addition he has made this company very successful and profitable in the last year." (CX 61, pp. 3940). Another application form contains the following assessment of "management capabilities": "Bank considers management to be excellent. Robert Heimann has been in this business for 30 years." (CX 61, p. 41). These documents make it clear that, at least from the lender's standpoint, Robert Heimann was actively involved in the direction and management of Royal, and, as such, he was an integral part of the lender's assessment of the ability of Royal to

generate the revenue necessary to service the additional debt.

It is of even greater significance that this $525,000 loan was in part secured by a third mortgage on real estate located at 10303 Howe Lane, Leawood, Kansas--the personal residence of Robert and Beverly Heimann. (CX 61, pp.8, 28). One who is a mere employee or consultant does not normally risk losing his home in order to finance his employer's capital improvements.

Robert Heimann was also a dominant figure with respect to produce sales and purchases at Royal. He was personally responsible for the purchase, sale, and transportation of a majority of the firm's produce transactions. (CX 18, p.8; Tr. 384, 389). Prior to his arrival at Royal, the firm was primarily a "banana house," selling bananas to local markets. (Tr. 608-09). After Robert joined Royal full-time in May, the business expanded to tomatoes and other fruit, as well as "shorts," spot sales made to grocery warehouses to make up for unexpected inventory deficiencies. (Tr. 609-11). Several witnesses testified that, in doing business with Royal, it was their impression that Robert was the individual in charge of operations at the firm. (Tr. 66-67, 84, 190-91, 200-01, *215-17, 354-56,* 363-64). Respondents maintain that his sole functions at Royal were to negotiate the purchase and sale of produce and arrange for its transportation. However, at least two witnesses experienced in the produce industry testified that those activities comprise the very essence of the business. (Tr. 190, 221). Further evidence of Robert Heimann's central role in the success or failure of the enterprise is illustrated by Jeff's acknowledgment that Royal carried a $500,000

"key man" life insurance policy on Robert Heimann and no other Royal employee. (CX 17, p.47).

Robert Heimann also determined when Royal would pay creditors for produce and whether purchasers were due an adjustment in the price of produce sold to them. (Tr. 91-94, 191, 194, 204-07, 215-16, 354). One witness testified that, when he was unsuccessful in his attempts to collect payment from Jeff Heimann for produce sold to Royal, he would speak with Robert Heimann, who regularly produced a payment for him. (Tr. 93). Another witness testified that, during a dispute which arose regarding lettuce he had purchased from Jeff Heimann, Jeff initially indicated his willingness to adjust the price, but, after Jeff consulted with Robert Heimann, Jeff told the witness that "he couldn't do it because he had orders from Bob that the bill stands as is." (Tr. 367). When Royal became delinquent on several freight bills, one creditor approached Robert Heimann with an offer to haul produce on a COD basis in exchange for payments on Royal's outstanding invoices. (Tr. 358). Although Jeff Heimann was present when the offer was made, it is clear from this testimony that Robert Heimann was the individual responsible for making the decision whether to accept the offer on behalf of Royal.

(Tr. 363-64).

There is evidence that distributions of Royal income were made to Robert Heimann and Beverly Heimann. During 1992, three Royal checks totaling $30,000 were made payable to Continental Oil with no corresponding deposit in Royal's account. (CX 21-23, 68; Tr. 335-36). Moreover, the $46,463 property distribution to Beverly Heimann in 1991 appears . . . inconsistent with the purported

retirement of her shares, since it was reported that she did not own any Royal stock during the 1991 tax year. (CX 19, [p]p. 14[, 17]). [The explanatory notes for Internal Revenue Service Form 4562, part V, schedule 2 (CX 19, p.17), which are referenced on CX 19, p.7, state that Beverly Heimann's shares were retired on or about January 2, 1991. It is unclear why this item was listed in Royal's 1991 tax return on Form *4562,* "Depreciation and Amortization," in item 23, *Property used more than 50%* in a qualified *business use.* This form's part V applies to cars, trucks, cellular phones, computers, etc., and it seemingly has no connection with Beverly Heimann 5 closely-held shares. Moreover, an examination of the record does not reveal where, if indeed, the shares were retired.]

When Royal began to experience financial difficulties, Robert Heimann attempted to bail the firm out. He reduced his consulting fee by 50%, down to $5,000 per month [and became a "salaried employee."] (Tr. 637-38). Also, during early 1992, Robert Heimann, through Continental Oil, made a series of at least 42 short-term loans to Royal to cover Royal's receivables. (CX 21-23; Tr. 596-600). The single largest of these loans was $87,500, with the average loan amount being slightly over $43,000. (CX 21-23). No interest was charged for Royal's use of the funds. (Tr. 391, 600). It appears from the evidence submitted that the great majority of these loans was repaid within a matter of days. (CX 21-23; Tr. 599-600).

Complainant's counsel makes much of these loans, arguing that they are evidence of a "check kiting scheme." This characterization is unwarranted and completely unsupported by the evidence. Although the

loans may not represent sound business practices, there is no evidence in the record which would tend to show that Respondents generated a false float through a check kiting scheme. In order to prove that Respondents were kiting checks, Complainant would need to show that Respondents' banks were put at risk by the absence of sufficient funds in the accounts, i.e., that the funds in Continental Oil's account were 'lot sufficient to cover the checks it was writing to Royal, and vice versa *See, eg., In re Blackfoot Livestock Commission Co., 45* Agric. Dec. *590,* 606-09 (1986), *aff'd,* 810 F.2d 916 (9th Cir. 1987). No such evidence was offered by Complainant. Therefore, I find absolutely no merit in Complainant's characterization of those transactions as "kiting."

Instead, what this series of transactions represents is further evidence that Robert Heimann was intimately involved in maintaining the financial welfare of Royal. Over a three-month period he made nearly $2 million in funds available to Royal, all of it interest-free. As with the mortgage on his residence to cover the half-million dollar SBA loan, this massive financial commitment is not the sort of practice that a mere employee would contemplate and even appears to be quite extreme for a father's assistance to one of his children. However, it is precisely what an entrepreneur might risk in order to keep his ailing business afloat. [This scheme had the additional aspect of keeping Robert S. Heimann's capital out of Royal, and away from creditors, when Royal failed.]

Robert Heimann had good reason for avoiding the appearance of holding a responsible position at Royal. The PACA investigation, his departure from UKC, and the subsequent Consent Decision implicating him in a scheme involving a false inspection certificate at UKC

would have put PACA officials ill at ease had they been aware of his connection with Royal. (Tr. *523-24, 526-27).* Although he testified at the hearing, Mr. Heimann made no attempt to deny his participation in the alleged falsification of the inspection certificate.

As a general rule, a corporation is treated as a separate legal entity, "but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons." *Capital Tel Co., Inc. v Mansfield. FCC,* 498 F.2d 734, 738 (D.C. Cir. 1974), quoting *Mansfield Journal Co. (FM) v. FCC,* 180 F.2d 28, 37 (D.C. Cir. 1950). In the context of the Department's regulatory programs, the United States Court of Appeals for the Third Circuit concluded as follows:

> Clearly, an order limited in its application only to the corporate petitioners probably would prove futile as the corporations could be dissolved and the individual petitioners could then, under the cloak of new corporations, engage in the proscribed activities and thereby frustrate the purposes of the Act. The law is well settled that the "corporate entity may be disregarded when the failure to do so would enable the corporate device to be used to circumvent a statute."

Bruhn's Freezer Meats v. United States Dep 't of Agriculture, 438 F.2d 1332, 1343 (3d Cir. 1971) (citations omitted). Moreover,

> **[w]hen at some innocent party's expense, the corporation is converted into such an instrumentality, "the courts will not permit themselves to be blinded or deceived by mere forms or law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."**

***Quinn v. Butz,* 510 F.2d 743, 758 ((D.C.] Cir. 1975), *quoting Chicago, M. & St. P. Ry. v. Minneapolis Civic & Commerce Ass 'n,* 247 U.S. 490, 501(1918).**

In determining whether an order should be made applicable to an individual respondent, the Department examines the totality of the circumstances surrounding the violation rather than the form of the business entity involved in order to effectuate the purposes of the statutes it administers. "The Department is properly concerned with who is in control of the business entity when any violations of Federal statutes (and/or USDA regulations emanating therefrom) occur," and the *after ego* theory is applied "so that any imposed sanction may also run against the individual(s) actually responsible for the corporate misbehavior, if appropriate in the context of the case." *In* Re *Lloyd Myers Co., inc.,* 51 Agric. Dec. 747, 767 (1992), aff'd, 15 F.3d 1086 (9th Cir. 1994)(, 1994 WL 20019 (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994)].

Even if proof existed with respect to a legitimate transfer of ownership from Robert Heimann to Jeff Heimann and Joe Cali, the *alter ego* doctrine would still apply in this case. The Judicial Officer made use of the *alter ego* theory

to find a similarly situated individual responsible for violations of the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.)* in *In re MCM Livestock, inc.,* 39 Agric. Dec. 893 (1980). In that case, the general manager responsible for the direction, management and control of a stockyard did not own stock in the respondent corporation; however, his wife was one-third owner. The Judicial Officer concluded that the *alter ego* doctrine applied to the manager because the violations represented "an established course of willful misconduct on his part which cannot be effectively deterred if he is not made personally subject to the order, and he therefore will be." *Id.* at 901. The same reasoning applies to this matter, where Mr. Heimann's participation in the produce industry cannot be effectively controlled unless he is held personally responsible for the violations.

I, therefore, conclude that Royal was the *alter ego* of Robert Heimann. Accordingly, he must be held individually accountable for the willful, flagrant and repeated violations of section 2(4) of the Act (7 U.S.C. § 499b(4)) found to have been committed by Royal under his direction and control. In reaching this conclusion, I have considered, *inter alia,* the lack of evidence with regard to a legitimate transfer of Royal ownership after the purchase of Royal by Robert Heimann, the extensive financial assistance provided to Royal by Mr. Heimann, the extent to which Mr. Heimann directed and managed the operations of Royal, and the distributions of Royal income and property to Mr. and Mrs. Heimann.

The PACA license issued to Royal was terminated when the annual renewal fee was not paid. Accordingly, the appropriate sanction with respect to Royal and Robert Heimann is publication of the facts and circumstances of

the violation. (Tr. 535). This is in accord with the sanction policy announced by the Judicial officer in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), *50* Agric. Dec. 476, 497 (1991), *affd,* 991 F.2d 803 (9th Cir. 1993)[, 1993 WL 128889 (not to be cited as precedent under 9th Circuit Rule 36-3)].

II. Midland Banana & Tomato Co., Inc.

The Complaint alleges that Midland wrongfully obtained a PACA license by submitting an application which contained false and misleading statements in violation of section 8(c) of the Act. (7 U.S.C. § 499h(c)). Complainant contends that Respondent Susan E. Heimann, who was listed in the application as the sole shareholder, officer and director of Midland, failed to reveal that Midland was a successor corporation to Royal and concealed the true roles of her father, Robert Heimann, and brother, Jeff Heimann, in the management of Midland. Complainant also alleges that Susan Heimann failed to provide new information to update her responses with respect to questions on the application concerning reparation awards against Royal.

Susan Heimann personally provided the information necessary to complete Midland's Application for License (Form FV-211), which was submitted on November 23, 1992. (CX 26). Based on the answers provided in the application, Midland was issued PACA License No.930297, which was last renewed in November 1993. Susan Heimann testified that, because she had prior commitments at school in Lawrence, Kansas, she did not personally fill out the application form. (Tr. 492-93). Susan testified that instead, a Midland employee, Karen

Ward, read the application to her over the telephone and that Ms. Ward completed the application as Susan provided the responses (Tr. 477) and signed Susan's name on the application. (Tr. 493). When initially questioned about the application by a USDA investigator, Susan maintained that she had personally completed and signed the form. (CX 43; Tr. 492). However, Susan subsequently acknowledged that the form had been completed and signed by Ms. Ward on her behalf and provided the investigator with an[] "Agency Ratification," dated June 17, 1993, authorizing Ms. Ward's actions. (CX 42, p.2; Tr. 492-93). The information contained on the Midland license application is false and misleading in that it fails to reveal material facts with respect to the management and prior history of the business. Question 11 of the Application states: "Does the applicant firm succeed another firm?" (CX 26). The application submitted by Midland contains a "no" answer in response to this question. The evidence submitted in this case clearly indicates that, from the time it was formed, Midland was a successor to the then-defunct Royal. I agree with Complainant's contention that Midland was merely a scaled-down version of Royal (born within hours of Royal's demise].

Midland continued the operations of Royal by hardly missing a day of business. When Royal ceased operations on November 17, 1992, Jeffrey Heimann [had already] distributed an announcement [on November 9, 1992,] that "a new company, similar to Royal Fruit Co. will be leasing the building as of November 18, 1992 and perhaps they will be able to hire you." (CX 62). It is more than a mere coincidence that Jeff Heimann's optimistic prediction proved to be accurate--although Midland was not able to keep every former Royal employee on the

payroll, at least one-third were employed at Midland. (CX 25, 37, 39).

With the exception of the names on the PACA license applications, there is little to distinguish Royal and Midland. Midland (assumed the mortgage note, purchased, and] operated out of Royal's facility at 303 Grand Avenue in Kansas City, using the same telephone and facsimile numbers. (CX 18, p. 12[; RX 17]) Even though Midland commenced business in November, Midland employees did not begin answering the telephones as "Midland Banana and Tomato" until January 1. (CX 17, p.20). Midland utilized Royal's office equipment, assumed the lease on Royal's tomato wrapping machine and used other Royal warehouse equipment such as jacks and two-wheelers. (CX 17, p.20; RX 21). Midland's customers were the same as Royal's: government purchases, Associated Grocers and Fleming Foods continued to comprise the bulk of sales. (CX 17, p.21; Tr. 380-82). Indeed, the testimony of several experienced members of the produce industry who dealt with both Royal and Midland indicated that they perceived no real difference between the two entities. (Tr. 71, 187, 207-08).

Respondent argues that *In re Skyline Foods, Inc,* 52 Agric. Dec. 1598 (1993), applies to Midland and requires a finding that Midland was not a successor to Royal. I do not agree. In *Skyline,* the individual identified as the corporate president and shareholder of the alleged successor firm had more than twenty years' business experience and had contributed $100,000 of his personal funds to the firm's operating capital. *Id.* at 1602, 1604. In the instant case, Susan Heimann, being scarcely more than a teenager, was] the sole shareholder, officer and

director of Midland(, but] had no prior business experience before the corporation was formed and she contributed only a very small fraction of funds [$500 (Tr. 473)] to the firm's initial capitalization. Moreover, the evidence in *Skyline* indicated that the president of that company actually participated in the management and exercised control of the enterprise without the assistance of those involved in the previous company. CL at 1604-05. In the present matter, Susan Heimann had very little, if any, real authority over the operations of Midland. Instead, Royal and Midland both operated under the direction and management of the same individual--Robert Heimann.

Based on the foregoing, I conclude that Midland succeeded Royal as a mere continuation or reincarnation of the former business because there was a substantial continuity of identity in the business enterprise before and after the change. It operated out of Royal's facility under the same management, used Royal's equipment, kept many of Royal's employees, and served the same customers who considered it to be essentially the same company as Royal. Therefore, the answer to Question 11 of Midland's PACA ... application is false and misleading.

I also find Midland's application to be misleading on its face because it concealed the identity of the true principal of the firm. Although Susan Heimann was listed on the Midland application as the firm's sole shareholder, officer and director, it is clear that she was merely a figurehead who served to shield her father, the true owner and principal of Midland. It appears that Susan participated in this ruse out of loyalty to her family. She testified that, if Midland had not been formed, her parents would be required to sell their home and move to Florida and her

brother would be out of work. (Tr. 476, 504). Testimony of Robert Heimann supports this conclusion. (Tr. 639-640; CX 18, p.1). While I may personally sympathize with her motives, her actions were clearly designed to circumvent the provisions of the PACA and cannot be ignored.

Susan Heimann's actual participation in the affairs of Midland and her knowledge with regard to the produce industry are both very limited. She is a busy, full-time college student at the University of Kansas, in Lawrence, Kansas. (Tr. 464). With the exception of occasional weekend work at fruit stands, she has no prior experience in the produce industry. (CX 17, p.19; Tr. 474). Susan testified that she visited Midland up to three times a week for a total of approximately 15 hours a week in connection with her duties as sole officer and director of the enterprise. (Tr. 485-86). Although I agree with Respondents' contention that a shareholder need not be actively involved in the management of a business she owns, the same cannot be said for one who is also identified as the sole officer and director of a corporation. There is no evidence that Susan received any compensation for serving as the sole officer and director of Midland; nor does she appear on the Midland's employee list. (CX 37, 39). Moreover, there is no evidence that she received distributions of Midland earnings as a shareholder.

Susan claims to have contributed *$500* to the initial capitalization of Midland. (Tr. 473). The remainder, $30,000, came in the form of unsecured loans from Robert Heimann's friends. (CX 18, p.3). Susan acknowledged that she would have been unable to borrow such a large amount of money without her father. (Tr. 482, 498-99).

I conclude that Robert Heimann was the true principal at Midland, actively involved in the direction and control of virtually every significant aspect of the firm's operations. As general manager of Midland, Robert Heimann's duty was to run the business. His responsibilities included purchasing and selling virtually all of the produce (CX 18, pp.34), checking files, paying bills, hiring and firing employees, arranging for transportation, maintaining inventory (CX 18, p.4, 14), inspecting produce (CX 18, p.1), and overseeing the day-to-day operations of the business. (CX 43). He acknowledged that "I've got to worry about everything.. .. I have the responsibility of everything on my back." (CX 18, p.14). This statement reveals the true nature of Robert Heimann's role at Midland.

Strikingly similar factual circumstances have arisen in proceedings in previous cases brought under section 8(c) of the Act. In *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338 (1986), Weller, an individual involved with produce firms that had pending reparation proceedings "seized upon the idea of forming a new corporation . using some of his loyal and dedicated employees as the incorporators, directors, officers *and* stockholders through which he could continue potato operations and insulate some funds from growing financial delinquencies." *Id. at* 340. The new corporation submitted a license application which made no mention of Weller's relationship to the applicant. The application, "on its face, appeared to be proper. There was no apparent reason to raise suspicions or doubts. It was approved and a license was issued." *ICL* The new corporation used Weller's building, equipment, employees and telephones. Id. 343-44. The [Judicial Officer] concluded that the

application was misleading because it "failed to disclose in any way the dominating and controlling interest of Weller. Weller, without question, was the primary beneficiary of Respondent's existence and affairs, and dominated its every move." *Id.* at *350. See also In re George Townsend,* 35 Agric. Dec. 1604, 1615 (1976) (A disciplinary proceeding arising under the Packers and Stockyards Act, wherein the court concluded, "the corporation was formed under the dark shadow of the [previous entity's] legal difficulties then pending and well known. It is thus concluded that the corporation was formed at that time for the major purpose of evading and circumventing the impact of any potential sanction of the continuing business operations of the former [entity]."). I, therefore, conclude that the application submitted by Midland contains, through a combination of omission and concealment, misleading statements with respect to the ownership and management of the enterprise.

The cases arising under section 8(c) of the PACA indicate the Department's willingness to hold to a strict interpretation of its requirements. Intent is not a part of the offense. In *!n re Perfect Potato Packers, Inc.,* 45 Agric. Dec. 338, 353-54 (1986), the Judicial Officer stated as follows: "Respondent argues that there was no intent to defraud, but intent to defraud is not at issue here. Respondent's license may be revoked if 'the license was obtained through a false or misleading statement in the application therefore (7 U.S.C. § 499h(c))." In *In Re Lloyd Myers Co., Inc,* 51 Agric. Dec. 747, 767 (1992), *Id,* 15 F.3d 1086 (9th Cir. 1994)[, 1994 WL 20019 (not to be cited as precedent under 9th Circuit Rule 36-3), *printed* in 53 Agric. Dec. 686 (1994)], the Judicial Officer affirmed the revocation of a PACA license because, *inter* alia, the application represented that the applicant was a

corporation when in fact the corporate charter had been temporarily suspended. Regardless of the fact that the corporate charter was subsequently "revived," the Judicial Officer held that the license application was false and misleading, and concluded that the violation "is discernable from the application document, itself; and whether the facts thereon are false or misleading *to the PACA Examiners"* determined whether the application was in violation of the Act. *Id.* at 760 (emphasis in original).

It is . . . clear [that] Midland's "no" answers in response to Question 10 are [also] false.[5] Question 10 of the Application for License states as follows:

> **Has any person employed by the applicant been the individual owner, partner, officer, director, or holder of more than 10% of the outstanding stock of a firm, association or corporation:**
>
> **a. Whose license is under suspension or has been revoked?**
> **b. Who has been found to have committed any flagrant or repeated violations of the Act?**
> **c. Against whom there is an unpaid reparation award?**

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[5] **The ALJ failed to decide whether Midland's application contained a false statement in connection with Question 10 (Initial Decision at 33-34). My changes to this portion of the ALJ's *Decision* reflect my finding that Questions 10a and 10c were answered falsely. This is explained in detail in my Additional Conclusions, part III, *infra*.]**

Robert Heimann acknowledged that his license had been "pulled" in connection with his involvement with Gilbert Corporation's failure to pay reparation orders in the mid-1970's. (CX 18, p.6). . .. [There is reliable evidence that the Gilbert license was under an ongoing suspension pursuant to 7 U.S.C. § 499m(b) for failure to submit documents in connection with the foregoing reparation claims. Presumably, no documentary evidence, other than the reparation cases, *supra,* exists which would substantiate this claim because such old records are either in storage or have been destroyed. (Tr. 550). But it does appear from the testimony of Complainant's witness, Mr. Clark, that he was personally knowtedgeable about the Gilbert investigation and that he serves as the "institutional memory" with respect to such matters. (Tr. 551). Finally, Complainant contends that, when Susan submitted the "Agency Ratification" in June 1993 (CX 42), the answer to Question 10 should have been updated with respect to Jeffrey Heimann's relationship with Royal. However, the record indicates that the PACA branch was already in communication with Midland regarding Jeff Heimann's employment status. (CX 41). Nevertheless, I do make a finding that Midland's application contained false statements in connection with Questions 10a and 10c.]

The *alter ego* analysis with respect to Royal, *supra,* applies equally here to Robert Heimann's relationship with Midland. On the basis of his obvious domination and control over the affairs of the corporation, I conclude that Robert Heimann was beneficial owner of 100% of the Midland stock ostensibly owned by his daughter, Susan Heimann. Therefore, the Order shall be made to apply to him individually.

I also conclude that Susan Heimann violated the Act through her willful participation in the scheme to circumvent the PACA by submitting a PACA application which contained false and misleading statements. Although she appears to have been primarily motivated by loyalty to her family, her actions were nonetheless designed to circumvent the provisions of the PACA; therefore, she also will be made part of the Order.

Complainant has failed to meet its burden of proof with respect to the allegations relating to Jeffrey Heimann. Although Jeff Heimann was employed in various capacities at Midland, I conclude that the evidence is insufficient to meet the requirements discussed, *supra,* necessary for a finding that Midland was his *alter ego,* as Complainant alleges. Regardless of this finding, because he is an individual identified as being a shareholder, officer and director of Royal, his future employment in the industry will, of course, be subject to the employment restrictions for PACA applicants and licensees contained in sections 4(b) and 8(b) of the Act (7 U.S.C. §§ 499d(b), 499h(b)).

Complainant recommends the revocation of Midland's license as a sanction for the above violations, which is what the Act requires. 7 U.S.C. § 499h(c). Such a sanction is appropriate and is in accordance with the sanction policy announced by the Judicial officer in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), *50* Agric. Dec. 476, 497 (1991), *affd,* 991 F.2d 803 (9th Cir. 1993)[, 1993 WL 128889 (not to be cited as precedent under 9th Circuit Rule 36-3)]. Therefore, an Order will be entered revoking Midland's license.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

In both Nos. *D-93-548* and D-93-549, Respondents argue that the ALJ's key findings are erroneous, in that Complainant's allegations are not adequately supported by the record. However, I find that the record abundantly supports the Complainant's allegations. In fact, the proof here far surpasses a *preponderance of the evidence,* which is all that is required.[6]

Preliminary Statement

The ALJ has done a commendably meticulous job of explicating the evidence from a very large record of over 100 multi-page exhibits, many witnesses, 661 pages of testimony, 387 pages of related depositions, and older, pertinent disciplinary cases involving Respondent Robert S. Heimann dating back to the mid-70's. And, this proceeding is ultimately all about Robert S. Heimann. While other names of individuals and corporations appear in the Complaints, the central focus *is,* and should be, Robert S. Heimann. I conclude, after reviewing the evidence and the Initial Decision, that Robert S. Heimann is precisely the type of violator Congress had in mind when it enacted the PACA's financial responsibility

[6] *See Herman & MacLean v. Huddleston, 459* U.S. 375, 387-92 (1983); *Steadman v. SEC,* 450 U.S. 91, 92-104 (1981); *In re Albert Lee Rowland,* 40 Agric. Dec. 1934,1941 *n.5* (1981), *aff'd,* 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.,* 37 Agric. Dec. 1336, 1346 (1978), *aff'd,* No.78-3134 (D.NJ. May 25, 1979), *aff'd mem.,* 614 F.2d 770 (3d Cir. 1980).

statutes, in order to combat the sharp practices plaguing the industry, and "to establish bars to preclude all but financially responsible persons from engaging in business subject to the Act." *(Zwick v. Freeman, supra,* 373 F.2d at 117; *Marvin Tragash Co., supra,* 524 F.2d at 1257.)

An examination of the evidence reveals that Robert S. Heimann has skillfully manipulated the PACA licensing, regulatory and disciplinary rules, regulations and statutes to maintain himself in business as a produce dealer, in spite of serious, repeated, and flagrant violations of the Act and regulations, as explained below. Along the way, as the evidence clearly shows, Robert S. Heimann has intricately involved his two rather young children (a daughter in her late teens, and a 21-year-old son), his wife, friends, and others, in his various schemes to operate in violation of the PACA's financial responsibility regulations. The evidence shows that Robert S. Heimann's legacy of 20 years of unfair practices has been passed to his children, Jeffrey and Susan' who willingly accepted.

Robert S. Heimann consistently advanced these schemes in the most sophisticated and skillful fashion, under color of law, and with legal papers always filed in the correct places. It has been arduous for the Complainant to amass the kind of evidence necessary to uncover about two decades of Robert S. Heimann's sophisticated abuse of the system. I note here that the record shows huge losses over these years to other produce dealers and suppliers--because of Robert S. Heimann--in the many hundreds of thousands of dollars. There are expensive recent examples, too. For instance, Mr. Perryman testified that Robert S. Heimann caused him to lose *$450,000,* since he was the succeeding owner of United KC., Inc.,

which closed because of Robert S. Heimann's misbehavior. Royal stipulated to owing $423,302.70, and Gilbert left sellers holding the bag for about $50,000 (Tr. *115).* The American taxpayer apparently has been left holding one SBA-guaranteed mortgage note for *85%* of about one-half million dollars; and the other smaller SBA loan (to Royal) is in default at $55,000 (CX 17, p. 43). Robert S. Heimann's misbehavior has been very expensive for a lot of people, for a lot of years.

Because Robert S. Heimann hid behind other people's names, his companies (Royal and Midland) did not list him as anything on the corporate, or other, papers. He was not an officer or director, or even a shareholder. He was paid as a "consultant," so that he was not even listed as an employee-except briefly, at Royal, in early 1992 (CX 17, p.37). However, the Complainant's evidence allowed the ALJ properly to see through this elaborate ruse. In fact, it is obvious to anyone who reviews the record that these proceedings arise from Robert S. Heimann's *sub rosa* domination and control of his two companies, even though he was apparently acting only as a "consultant."

In the *Royal* proceeding, the Royal Fruit corporation stipulated to its failure to make full payment promptly, and, since Robert S. Heimann was in charge of operations, he should be held responsible, as well. However, Respondents argue that Robert S. Heimann was merely a salesman for Royal, and cannot be held accountable for the violations. Superficially, Robert S. Heimann might appear to be only an employee or consultant, but further examination reveals this not to be true. I note that the record shows that Robert S. Heimann has not been listed as an owner, stockholder, director or officer of Royal (or of any of his various other produce

companies for that matter, since The Gilbert Corporation in the 1970's).

In the *Midland* proceeding, Robert S. Heimann set up his teenage daughter to be the owner, the only director, the only shareholder, and the only officer of the succeedingcorporation (Midland) to the failed Royal. His daughter was a full-time, 19-year-old university student at the time, but supposedly commuted from college 3 days a week for a few hours to run her dad's business. To some readers, this defense might appear laughable, but Robert S. Heimann filed all the appropriate corporate, PACA and other documents to support this ruse. His daughter got on the stand and testified to it, as well. Therefore, it must be taken seriously. Nevertheless, I find Robert S. Heimann was the real key figure behind Midland, as explained below.

I. Credibility of Witnesses.

Respondents appeal the findings of the ALJ because, they argue, the ALJ's "findings and inferences are not supported by competent evidence" (Respondents' Appeal Petition, p.1 (Sept.29, 1994)). I find that a large part of the evidence in both the *Royal* and *Midland* proceedings is formed by the testimony of Respondents, Susan Heimann, Robert S. Heimann, and Jeffrey Heimann; and by the *responsibility-connected* Joe Cali. (Mr. Cali officially achieved this designation just recently, *see In re John J Conforti,* 54 Agric. Dec. ___ (Feb.28, 1995), *appeal docketed, No.95-1735* (8th Cir. Mar.22, *1995).)*

Although the ALJ made no specific credibility determinations on these witnesses, I find that the ALJ's discussion of the evidence, together with the ALJ's

findings, indicate clearly to me that the ALJ did not find these witnesses' testimony at all credible. However, irrespective of the *ALJ's credibility determinations, the Judicial Officer would still be able to make a separate determination that these witnesses have very little credibility (see In re Tipco, Inc., 50* Agric. Dec. 871, 890-93 (1991), *aff'd per curiam,* 953 F.2d 639 (4th Cir.), 1992 *WL 14586, printed in 51* Agric. Dec. 720 (1992), *cert. denied,* 113 S.Ct 84 (1992), for a lengthy supportive discussion based upon *Universal Camera Corp. v. NLRB,* 340 U.S. *474, 496, cert. denied,* 71 S.Ct. *456* (1951).) The summary statement at the end of this analysis is worth quoting here, *as* follows *(Id at* 893):

> From the foregoing, it is abundantly clear that the Judicial Officer is not bound by the credibility determinations of the ALJ, and that the standard on court review is whether there is substantial evidence to support the Judicial Officer's contrary decision.

The picture the evidence paints for me is one where Robert S. Heimann, remembering his *Gilbert* fiasco, sought to arrange a situation where he could buy and sell produce, with the liability protection of incorporation; but the freedom of a sole proprietorship. In buying the Ribaste's sole proprietorship, and incorporating Royal with relatives and friends who were scarcely more than teenagers, as owners and officers, Robert S. Heimann had the best of both worlds. Robert S. Heimann controlled everything at Royal, and kept the capital in his personal hands, not in the corporation. This methodology allowed Robert S. Heimann to operate as a licensed PACA dealer, with Robert S. Heimann having to answer no questions

from PACA officials. Unfortunately, Robert S. Heimann's produce operations virtually always cause suppliers and his customers to suffer great losses, after which Robert S. Heimann would just walk away.

Consequently, I find that Robert, Jeffrey, and Susan Heimann and Joe Cali have little credibility. Each Respondent understandably has a self-serving reason to present his or her testimony in a way favorable to his or her defense. However, such testimony still must be examined to determine those occasions where they have been disingenuous, or even plainly false. The record reveals numerous instances where each of the above has admitted misleading various authorities. Since the crux of these matters, *sub judice,* can be simplified to questions of deception-false and misleading statements in the *Midland* license application, and in *Royal* false and misleading actions and testimony about Robert S. Heimann's domination and control of Royal-the Respondents' credibility is crucial to the decision in these proceedings.

A few examples, which will be the subject of further discussion, *infra,* will show why I find these Respondents incredible. Susan Heimann claimed to have signed the *Midland* application, but later admitted that Karen Ward had filled it out and had signed it for her. Susan Heimann's rationalization was that she was at school and just asked Karen Ward to sign it for her. She admitted that she lied so that Karen would not get in trouble. I find that Susan Heimann could reasonably be expected to lie again, so that her father, Robert, would not get in trouble.

Jeffrey B. Heimann admitted in a sworn deposition that his mother, Beverly Heimann, was listed as a Royal vice president on Royal's Small Business Administration loan

application as a sham just to get an SBA loan; that they needed a "minority" (woman); that she had no actual duties; that "she never even was involved *per se* as a vice-president"; and that "[s]he was something that was just on a piece of paper." (CX 17, p.6.)

Joe Cali was a responsibly-connected participant in Royal. Joe Cali had been at UKC with Robert S. Heimann. Joe Cali also falsely affirmed that Beverly Heimann would be a vice president at Royal, then he testified later that she was just a figurehead to fool the SBA into giving them loans.

Robert S. Heimann has the least credibility of all these witnesses, for a number of reasons. Primary to me is the fact that Robert S. Heimann walked away from The Gilbert Corporation proceedings in the 1970's, without producing the required documents, after Robert S. Heimann defaulted in nine reparations proceedings.

Robert S. Heimann signed a (many) bogus "State of Kansas Inspection Form(s)," but has yet to give a plausible reason, or any reason at all, for how his signature got on the form(s), in the UKC proceedings, discussed *infra.*

Robert S. Heimann was the key figure in the SBA-guaranteed loans to Royal, where Robert S. Heimann's wife, Beverly Heimann, was a sham figure, but was listed as a full-fledged participant, and a vice president, which was untrue. Respondents defaulted on the loans, leaving the American taxpayer to pay Respondents' bill. Robert S. Heimann was the reason the banks and SBA lent the money, but Robert S. Heimann

attempted to be legally not part of the ownership or management of Royal.

Robert S. Heimann listed no cash as assets in his SBA loan application, but was nevertheless able to write about 1.8 million dollars in checks to Royal, in amounts ranging anywhere from $40,000 to *$85,000*, yet Royal had virtually no capitalization. Who knows anybody who writes personal checks of that magnitude? Who writes such checks for cash? Why wasn't this money capitalized in Royal, the only place which Robert S. Heimann had as the source generating his cash? Continental had no worthwhile, productive assets, or any cash-generating activities except for Robert S. Heimann's produce companies. And, because Robert S. Heimann's historic and continuing financial presentation, to me, just does not add up, he has very little credibility.

In the following analyses of the *Royal* and the *Midland* cases, Respondents' individual points sometimes seem almost plausible, but "in the totality of the circumstances," as the ALJ put it' the evidence shows that Robert S. Heimann had the central role in Royal Fruit (Initial Decision at 16), and, later, in Midland.

I completely agree with the ALJ that, while the Respondents can argue individual factors which appear to distance Robert S. Heimann from Royal, the totality of the circumstances demonstrates the crucial, central role which Robert S. Heimann played in Royal's affairs. Robert S. Heimann was the key figure in nearly every important aspect of the business. Complainant needed only to prove that Robert S. Heimann, by a preponderance of the evidence, dominated and controlled Royal. I find that Complainant has easily met this

standard (preponderance of the evidence). There is no doubt whatever in my mind that Royal Fruit was the *alter ego* of Robert S. Heimann.

Respondents' "Appeal Petition" (Sept.29, 1994) attacks the ALJ's procedural authority to hold Robert S. Heimann responsible for Royal's and Midland's actions, and makes 25 numbered arguments against discrete portions of the "Discussion" section of the ALJ's Initial Decision (actually 24, because Respondents skipped number 8). By asserting that the ALJ's findings and inferences are not supported by competent evidence in 25 specific instances, Respondents invite a very detailed look at the evidence. Complainant has responded to each of the 25 numbered arguments. The Respondents' procedural argument will be addressed later.

My close examination of the overall record, the ALJ's Initial Decision, the Respondents' numbered arguments against the ALJ's Initial Decision, and the Complainant's responses reveal that the ALJ is correct on all points. In the interest of brevity, I will not repeat the ALJ's language, the Respondents' argument, or the Complainant's response; but, rather, will just decide on each of the 25 arguments, *senati.* Of course, my decisions are made with the credibility of the witnesses in mind. (Since the ALJ also included formal, numbered Findings of Fact, I will refer to the Respondents' allegedly *"unsupported finding no.* 1' in the lower case. Note, the Respondents' allegedly *"unsupported finding"* numbers do not correspond with the ALJ's numbered Findings of Fact.)

II. Respondents' 25 Arguments That the AIJ's Findings Are Unsupported.

1. I agree with the ALJ that this record holds no proof that ownership of Royal ever passed from Robert S. Heimann to Jeffrey B. Heimann or Joe Cali. Respondents' argument, which asserts that Robert S. Heimann was not ever an owner, because the Ribaste's never transferred "title" by some deed, assignment, bill of sale, or other instrument to Robert S. Heimann, is rejected. I fmd that the sales agreement (CX 60) is sufficient to transfer ownership to Robert S. Heimann and Beverly Heimann, which sales agreement included the promissory note described in section 2.d, entitled PURCHASE PRICE (CX 60, pp.4-5).

Although the ALJ used the term "title," no real property was conveyed from Mr. Ribaste to Robert S. Heimann. Still, if one interprets "title" to mean ownership of the Ribaste's sole proprietorship as a "going concern" which constituted Royal (which I hereby do) (CX 60, p.2), then Mr. Ribaste specifically testified that "I sold it (Royal) to Bob Heimann" (Tr. 231). More accurately, Mr. Ribaste testified that he sold Royal to "Robert and Beverly Heimann" (CX 60; Tr. 226). In that same testimony, Mr. Ribaste testified that he was aware that Robert S. Heimann planned to have Jeffrey B. Heimann and Joe Cali "operate" and *"subsequently... own"* Royal (Tr. 231) (emphasis added). I find that this statement by Mr. Ribaste only adds additional support to the fact that Ribaste *sold it to Robert S. Heimann* and *Beverly Heimann.*

Mr. Ribaste also testified that he would not have sold Royal to Jeffrey B. Heimann and Joe Cali because of their youth and inexperience (Tr. 231-32); that he looked "to Bob Heimann for my $114,000" Tr. 232), and that

Robert S. Heimann's "expertise," "financial know how," "financial situation," and "know how to secure" his money, were the reasons Mr. Ribaste sold Royal to Robert S. Heimann (Tr. 231-32). In fact, both Joe Cali and Jeffrey B. Heimann *were* young and inexperienced, at least, at the level of owning and operating a PACA-regulated produce dealer. Joe Cali testified that, at the time of the Royal purchase, "Jeff was just out of college and I think I was 21 or 22 years old myself" (Tr. 386).

The sales agreement only lists Robert S. Heimann and Beverly Heimann as "Buyers" (CX 60, pp.1, 9). On July 8, 1988, they bought Royal, pursuant to a detailed, 8-page sales agreement. Two days later, Robert S. Heimann signed and dated a 6-line paragraph on a piece of paper purporting to determine the ownership of Royal Fruit Company (CX 60, p.13). 1 agree with the ALJ that this self-serving document has no legal effect on the ownership of Royal. However, even if it did establish a tri-equal partnership of Joe Cali, Jeffrey B. Heimann, and Beverly Heimann, I would find that Robert S. Heimann would still have been an owner of Royal, through his wife's one-third interest, and still subject to the ALJ's *alter ego* determination.

Moreover, I agree with the additional points made by Complainant that the evidence further establishes that Beverly Heimann was a stand-in for her husband, Robert S. Heimann, on the PACA license; that Robert S. Heimann owned a one-third interest in Royal through his wife; and that there were distributions of Royal Fruit property and funds that were inconsistent with the asserted termination of ownership interest

(Complainant's Initial Brief, pp.6-7, 16-17, 33-34; see also Respondents' allegedly *unsupported finding no.13, infra).*

2/3. Respondents' arguments in allegedly *unsupported findings nos. 2 and 3* are completely without merit. The record is clear that Jeffrey B. Heimann and Joe Cali paid *nothing* to the Ribastes in the July 8, 1988, purchase of Royal. Moreover, Joe Cali and Jeffrey B. Heimann are not shown anywhere in the record subsequently to have paid Robert S. Heimann *anything* for ownership of Royal.

The Respondents' argument that Robert S. Heimann never got any consideration from Joe Cali for his ownership of Royal because he never paid anything for Royal, and never even owned Royal, is patently false. Robert S. Heimann bought Royal pursuant to a contract entitled "Agreement," and in section 2, entitled "PURCHASE PRICE," subsection (d) specifically sets forth terms for the sale of Royal Fruit to the buyer (Robert S. Heimann and Beverly Heimann, husband and wife, hereinafter "BUYER" (CX 60, p.2)), as follows (CX 60, p.5) (emphasis added):

> d. Additionally, $114,587.21 shall be paid to Seller at the rate of *$15,000.00 every three (3) months commencing 90 days after all the accounts payable as set out in Exhibit "E", attached hereto and made apart hereof by reference, are satisfied in full.* A like amount shall be paid each ninety (90) days of $15,000.00 until the entire principal and interest are satisfied *in* full. Interest shall accrue on this amount at the rate of 12% per annum said interest commencing the

> day of execution of this Agreement. A Promissory Note evidencing this amount and these terms shall be executed in a Form as more fully set out in Exhibit "F", attached hereto and made a part hereof by reference.

These terms are irrefutable proof of the purchase/ownership of Royal by Robert S. Heimann and Beverly Heimann. The Respondents' argument really is that, since the purchase terms assumed by Robert S. Heimann and Beverly Heimann, *supra,* were paid off by the SBA loan ostensibly before the first $15,000 installment was due, there was never any obligation for payment, from the outset. Of course, this is absurd.

4. The portion of the Initial Decision in Respondents' allegedly *unsupported finding no.4* argument is attacked by Respondents on three bases, none of which has any merit.

First, Respondents complain that the ALJ erroneously states that Respondents' language admits that Robert S. Heimann purchased Royal. However, the ALJ had already decided that Robert S. Heimann purchased Royal, and the ALJ did not rely on Respondents' supposed admission to make that finding. This argument is quibbling.

Second, the Respondents argue that the ALJ's finding of an "unholy alliance" between Robert S. Heimann and Royal--exhibited in UKC's selling of distressed produce to Royal--is against the uncontroverted testimony of UKC's Breen and Perryman. These arguments are without merit. The ALJ did not use the term "unholy alliance," but such a pejorative term

could fit this situation. Even though Respondents emphatically state that UKC sold no "open billing" or "distress" produce, in the very same sentence, the Respondents characterize the sale of such merchandise by Robert S. Heimann to his son at Royal as "arm's length," "market value," and so forth. Such internal contradictions in their argument are particularly unpersuasive. Of course, UKC sold "distress" produce--they sold it to Royal.

Moreover, the transcript citations for UKC's Mr. Breen and Mr. Perryman, *supra,* do *not* contain "controverted testimony" on "arm's length," "market value," and "credit policies" as claimed by Respondents. The most that can be said about these witnesses is that they had "no information" on these questions, because that is the way the question was presented by Respondents' counsel and asked of both witnesses. (Tr. 80-82, 134-36, "you have no information that..., do you?"). The witnesses' (Breen and Perryman) testimony showed a great distrust, in fact, of Robert S. Heimann's dealings: [By Mr. Breen] "[W]e watched things like that very, very closely" (Tr. 81). The other witness (Mr. Perryman) testified that the "open billing" purchases by Robert S. Heimann, with Royal, were "directly related" to the reason that Robert S. Heimann left UKC. (Tr. 137-38) These witnesses were very suspicious of Robert S. Heimann's loyalties to Royal.

Finally, Respondents argue that the testimony by Joe Cali was about talking produce with Robert S. Heimann *after* he left UKC and became a consultant to Royal, and not talks occurring between Joe Cali at Royal and Robert S. Heimann at UKC. A close examination of Tr. 568-72 and CX 70 *do not* reveal that it is "absolutely

clear" that the consultations on produce between these two Respondents occurred after Robert S. Heimann left UKC. Joe Cali's explanation is ambivalent and could support eitherposition. However, Joe Cali testified that "I really can't remember exactly what I said to her" (Michelle Gill) (Tr. 570). But, I find that USDA Inspector Michelle (Gill) Holloway's testimony and her notes taken contemporaneously with her June 9, 1993, interview of Joe Cali are trustworthy and credible. All of his supports the ALJ's finding that Joe Cali talked produce with Robert S. Heimann while Robert S. Heimann was at UKC.

5/6. Respondents argue that a stream of events concerning Royal's financial operations is evidence that Robert S. Heimann was not an owner. officer, director, or shareholder of Royal, and, thus, the many and various contributions to Royal by Robert S. Heimann were made as a Royal employee. It is clear that Respondents' financial operations concerning Royal are complicated, and, purposefully confusing. Robert S. Heimann was always the most important figure in everything Royal did financially, and operationally. However, I agree with the ALJ that the many different factors tying Robert S. Heimann to Royal, such as, the confusing status of Robert S. Heimann (consultant, employee?), payroll and loan irregularities, and a phony vice presidency (for wife Beverly Heimann), were to enable Robert S. Heimann both to deal in produce and to enjoy plausible deniability to USDA investigators.

For example, Respondents argue, *inter alia,* that, although Robert S. Heimann mortgaged his home for collateral to get an SBA loan for Royal, made dozens of personal, no-interest loans to Royal, and was covered by

Royal for *$500,000* in key man life insurance (CX 17, p.47), Robert S. Heimann was merely an "employee." The evidence is overwhelming that Robert S. Heimann was not just an employee, but the key man at Royal. In fact, Robert S. Heimann held himself out as the key management person at Royal. The second SBA loan application for $525,000 lists Respondents Jeffrey B. Heimann, Joe Cali and Robert S. Heimann as names (with non-Respondent Beverly Heimann) under the blanks for "MANAGEMENT" ("proprietor, partners, officers, directors, and all holders of outstanding stock-100% of ownership must be shown" (CX 61, p.13) (emphasis in original). This part of the application lists Beverly Heimann as 33 1/3% owner, with equal thirds to Joe Cali and Jeffrey B. Heimann. So, what does that lead the SBA loan examiner to believe Robert S. Heimann to be? Proprietor? Officer? Director? The SBA loan examiner wrote that Robert S. Heimann's 30 years' experience made the underlying bank think Royal "MANAGEMENT" excellent *(Id.* at 41.)

Robert S. Heimann takes credit for the "rapid increase with growth and profit... as a result of my experience and commitment." (CX 61, p.18.) But, Robert S. Heimann held himself out to be a consultant, or an employee, depending upon who was asking and for what reason. The SBA loan examiner wrote that only Beverly Heimann, as a shareholder, had outside income, which was Robert S. Heimann's consulting fees. (CX 61, p.42.) So, variously, Robert S. Heimann was part of management, an employee, and a consultant, but not a director, partner, shareholder, or officer. Confusing? Of course, because that is the whole reason for the sham, which confusion was designed to allow Robert S.

Heimann to deal produce without being disciplined for violating PACA.

Consultant? Robert S. Heimann worked from a "company" he called Continental Oil and Gas, Inc.; or in the case of the "Consulting Agreement" with United K.C., Inc. (UKC), he called it "Continental Oil & Gas Corporation" (CX 65). Also, when Robert S. Heimann applied for the second SBA loan, he called it "Continental Oil & Gas" on the BALANCE SHEET (CX 61, p 20), but called it "Continental Oil & Gas, Inc.," on the FINANCIAL STATMENT (CX 61, p.21). The BALANCE SHEET lists under "other assets" unspecified "Oil & Gas leases" at a value of $75,000, as of the "BALANCE SHEET date of 12/31/88" (CX 61, p.20). Certainly, a rational person could not be faulted for believing that the Continental Oil & Gas Corporation was a corporation of some significance, based upon this application to a Federal agency for a federally-guaranteed loan, which application carries the usual penalties for false statements under 18 U.S.C. § 1001. However, in another forum, under oath, Robert S. Heimann describes the "Continental" operation a lot differently. He testified in a deposition in the litigation entitled *Tom Lange Co. v. Royal Fruit Company, et al - Robert Heimann: 1/15/93* that Continental was not a corporation, that it was merely Robert S. Heimann doing business as (d/b/a) Continental Oil & Gas "Corporation," and that it was not a significant company at all, as follows (CX 18, p.5) (emphasis added):

[BY MR. WEEMS]

Q. Before you were at United Fruit, where were you employed?

[BY MR. HEIMANN]

A. I was with Continental Oil & Gas Corporation.

Q. What did you do for Continental Oil & Gas?

A. It was a company that I owned and dabbled with oil leases and drilled some oil wells.

Q. Did you own that by yourself?

A. Yes.

Q. Was it a corporation?

A. No, it was just -- it was just called Continental Oil & Gas Corporation. *It never did a lot, to be honest.*

Q. It was never incorporated?

A. *It was not incorporated.* It was Robert Heimann, *d/b/a,* I guess, Continental Oil & Gas Corporation.

Q. How long did you work for Continental Oil & Gas?

A. About two or three well, two or three years the company had been in effect.

Q. '83 to *'85?*

A. Right.

Q. What did you do for Continental Oil & Gas?

A. Bought and sold leases, oil leases.

Q. Continental Oil & Gas had nothing to do with the produce area?

A. No.

@ Q. What was your reason for leaving Continental Oil & Gas to go to United?

A. The oil and gas market had literally collapsed and United Fruit Corporation came to me and wanted to know if I would be interested in getting back into the produce business.

Q. Was it Mr. Gallagher that hired you?

A. Yes.

Q. You had known him from before?

A. Yes.

Q. Where was Continental Oil & Gas headquarters?

A. 10303 Howe Lane, Leawood, Kansas.

Q. And that's your home address?

A. Right.

Q. Where were the oil and gas wells that Continental Oil & Gas dealt in?

A. Oh, down in southern, southeast Kansas, they had some leases up around the airport here in Kansas City, some gas leases, but *nothing was ever done or developed with them. They've since lapsed.*

Based upon this evidence, I find that Continental and Robert S. Heimann are one and the same. Robert S. Heimann's attempt to insulate himself from legal liability, and from responsibility under PACA, is rejected. I view Continental as just another name for the individual, Robert S. Heimann. Moreover, the ALJ is completely correct that Robert S. Heimann's activities are incompatible with the position that Robert S. Heimann was merely a consultant or employee. Thus, the Respondents' arguments numbered 5 and 6 are rejected.

7. As was clearly stated at the inception of my Additional Conclusions, the Complainant need only prove the allegations by a *preponderance of the evidence.* Complainant has placed a great volume of testamentary and documentary evidence in this record which shows that Robert S. Heimann was the key man at Royal: for instance, he bought Royal from the Ribastes; he bought and sold Royal's produce; he arranged the corporation's finances; he placed family and friends in management positions; he very frequently lent large amounts of interest-free money to Royal to continue it in business, and so forth. The evidentiary standard is whether it is

more likely than not that the Complainant's version of the facts in the record is correct.

Respondents' stated argument is that the ALJ's findings herein are "unsupported." On the contrary, even the nature of Respondents' argument in number 7 shows that the ALJ's finding is supported, because Respondents are really arguing that there are other evidentiary items whicch support a different finding. For instance, Respondents concede that Robert S. Heimann's buying and selling of produce is "improtant," but argue that other important management activities at Royal were not shown to be done by Robert S. Heimann: "not one scintilla of evidence to suggest that [Robert S. Heimann] participated...in...these vital decisions." (respondents' Appeal Petition, supra, at 8).

I find that the ALJ does not have to show that Robert S. Heimann made every important management decision to find that Robert S. Heimann had dominion and control over Royal. The ALJ has shown a preponderance of the evidence for his finding that Robert S. Heimann was in controal, and this is sufficient.

Moreover, Respondents are not persuasive in their argument that there is no scinitlla of evidence that RObert S. Heimann participated in certain vital decisions. I am completely convinced that RObert S. Heimann was intimately involved in every management decsion at Royal, and my belief is buttressed by the lack of credibility I give to the witnesses claiming to have made "viatal" decisions. But, even if some of the "vital" decision were delegated to others by Robert S. Heiman, that still does not preclude the ALJ's finding that Robert S. Heiman dominated and controlled Royal.

Thus, Respondents' stated argument that the ALJ's finding is unsupported is meritless, because it is supported. Moevover, the Repsondents' implicit argument--that more vital and important, decisions were made at Royal by others than Robert S. Heimann, so that Robert S. Heimann cannot have directed and controlled Royal--is also meritless, because the ALJ's finding reasonably determined that a preponderance of the evidence established Robert S. Heimann as the key man at Royal, which is all that is required. The fact that others made vital decsions at Royal (I do not believe this fact) is not mutually exclusive to Robert S. Heimann being the key man dominating and controlling Royalo.

Finally, I agree with Complainant's additional arguent herein, that RObert S. HEimann was a "dealer" under PACA, and an additional determination, with Complainant's detailed expalnation, appears infraf,

8. Omitted by Respondents.

9. An examination of the witnesses' testimony and the relevant, related facts reveal that the ALJ did not, as Respondents argue, grossly mischaracterize the record when he concluded that RObert S. Heimann determined when and how much Royal would pay it creditors. The Complainant's witnesses, who were creditors of Royal, were credible and convincing in their testimony, basically, that to get Royal to cut a check for disinterested witnesses like Complainants's with those of Respondents, I find that Respondents' argument must be rejected because of the evidence that shows that Robert S. Heimann did decide which creditor got how much and when the creditor got it.

10. Again, Respondents couch their appeal in terms of the ALJ's finding being "unsupported." This is incorrect, because Mr. Breen is an eyewitness, who testified that Robert S. Heimann behaved within the Royal management as the "man in charge." Thus, the Complainant's allegation, and the ALJ's finding, that Robert S. Heimann was the key man at Royal, are *supported* by Mr. Breen's testimony. Certainly, Respondents do not agree, and put a different spin on Mr. Breen's testimony. But, it is entirely reasonable for Mr. Breen to believe Robert S. Heimann was m charge, if Robert S. Heimann could produce a payment for a creditor when others in Royal management could not or would not. It must be remembered that the Complainant's central allegation is that Robert S. Heimann was the only real power in Royal, which company Robert S. Heimann bought and operated using family members and friends as figureheads. Mr. Breen's testimony certainly supports this position.

11. Witness Paul Guarino's testimony is significant for the same reasons as the preceding witness in the argument in Respondents' allegedly *unsupported finding no.10.* However, we are not concerned that these are accurate depictions of the specific transactions discussed. Rather, these witnesses show the clout and power residing in Robert S. Heimann's internal decisionmaking on Royal's core business: selling/buying produce. Since the Heimanns and Joe Cali have all testified that Robert S. Heimann did not run the show, and that the management, ownership and control of Royal was set up as shown in the corporate legal papers, the Complainant must prove its case in another way, here through witnesses who experienced firsthand how Royal

really operated. Respondents' argument is that witness Guarino's testimony *does not support* the ALJ's finding, essentially, that Robert S. Heimann could (and here actually did) countermand decisions made by his young (by now 23- or 24-year-old) son, Jeff. This is without merit because Mr. Guarino's testimony clearly does support the ALJ's finding.

12. Once again, a credible witness testified from firsthand knowledge of the Royal management. Mr. Crosby's testimony is essentially that he believed that Robert S. Heimann had final decisionmaking authority at Royal, based upon his (Mr. Crosby's) experience. Respondents argue that this somehow leaves the ALJ's (what Respondents' call) *unsupported finding no.12* unsupported. Complainant responded that Crosby's testimony shows, at least, that Robert S. Heimann *shared* management direction and control of Royal with Joe Cali and Jeffrey B. Heimann. I find that the ALJ's finding is that Robert S. Heimann made Royal's management decisions, such as, for instance, the one from Mr. Crosby on COD hauling, and that the ALJ (properly) found Crosby's testimony supportive of this finding. I agree and thus find Respondents' argument in the allegedly *unsupported finding no.12* meritless.

13. The ALJ's allegedly *unsupported finding no.13* that there is evidence that distributions of Royal's income were made to Robert S. Heimann and Beverly Heimann is correct. Respondents' argument, that the three $10,000 payments in the first quarter of 1992 were routine $ 10,000-per-month consultancy payments to Robert S. Heimann, is specifically contradicted by Robert S. Heimann's testimony in the *Lange* deposition, as follows (CX 18, p.5):

[BY MR. WEEMS)

Q. What was your initial compensation at Royal?

[BY MR. ROBERT S. HEIMANN]

A. I started out as a consultant. They matched the salary I was getting at United. It was $10,000 a month.

Q. What did you do as a consultant for Royal?

A. Bought and sold produce.

Q. How long did you continue *as a* consultant?

A. Until, I think, January of '92 I went on a salary basis.

Q. So, you were on that $10,000 a month from 1989 through the beginning of '92?

A. Right.

Q. What was the salary then that you went on in January of '92?

A. $5,000 gross a month, plus hospitalization, plus an insurance policy.

Jeffrey B. Heimann also testified that this was the case in his *Lange* deposition, *as* follows (CX 17, p.54).

[BY MR. JEFFREY B. HEIMANN]

A. I want to clarify something that's on the record there.

Q. (BY MR. WEEMS) Sure.

A. You asked a question on compensation of Robert Heimann.

Q. Uh-huh.

A. At the beginning of 1992 I stated that he made $10,000 a month. I made an error on that due to the rushing in answering my answer. It is 5,000 a month.

Q. 5,000 a month?

A. For the record it's 5,000 a month that he was compensated.

Q. And was that the same throughout all of 1992?

A. Yes.

Q. Okay. And what was he compensated when he first came to Royal Fruit?

A. Be more specific.

Q. When he first started working for Royal Fruit did he receive a salary?

A. He received 5-- when he started working for Royal Fruit Company he received 5,000 when he was an employee of Royal Fruit Company. He was paid 5,000 a month.

Q. Okay. So, from 1989 when he started through 1992 when he ended he received $5,000 a month?

A. I don't follow what you're saying right there. He wasn't an employee. He worked as a consultant.

Q. A consultant. Okay. And what was his salary when he was a consultant?

A. 10,000.

Q. 10,000?

A. Yes. And then when he was employed by Royal he made 5,000.

Q. All right.

A. Okay?

Q. What did he do as a consultant?

A. The same thing he did when he was an employee; he bought and sold.

Q. All right. So, as a consultant, he received $10,000 a month. How long did he remain a consultant then?

A. When he was hired by Royal -- hired by Royal Fruit Company to buy and sell all the way up till 1992 and then he became an employee of Royal Fruit Company in January of 1992.

Q. In January of '92?

A. Yes.

Q. And that's when his salary dropped from 10,000 to 5,000?

A. Right.

Q. January, '92?

A. Yes.

Q. Okay. All right. And his div[v]y stayed the same?

A. Yes.

Therefore, Respondents Robert S. Heimann and Jeffrey B. Heimann testified that Robert S. Heimann got $5,000 a month as a Royal *employee* in the first 3 months of 1992. However, there are three checks for $10,000 for which there are no corresponding repayments to Royal by Robert S. Heimann and/or Continental Oil & Gas Corporation, and, which checks the Complainant and the ALJ have documented:

Although USDA's investigator testified that Robert S. Heimann was paid as a consultant (Tr. 336), he merely knew that "at some moment in time" he was told that Robert S. Heimann was "paid as a consultant" (Tr. 336) The significance of the form of payment *(vis-a-vis* employee or consultant) was not part of his answer. His testimony is not enough to outweigh the documentary and testamentary evidence on these payments. The record as a whole shows that Robert S. Heimann took $10,000 out of Royal on January 3, 1992, on January 27, 1992, and again on March 3, 1992 (Tr. 335) (presumably in addition to a $5,000-per-month salary), at a time of Royal's great financial distress.

Therefore, I find that the ALJ is correct, and that Respondents' argument on the three $10,000 checks as Robert S. Heimann's monthly compensation should be and is hereby rejected.

The second part of Respondents' argument is problematic, because of the way Beverly Heimann reported her ownership of 33 1/3% share of Royal for 1991 tax year purposes. Since ownership of stock during any part of a year is considered by the Internal Revenue Service for purposes of tax reporting to be ownership of stock for all of that year, it cannot be considered accurate from a tax-reporting standpoint for Beverly Heimann to put "0%" ownership in line A of Schedule K1 (Form 11205) "SHAREHOLDERS SHARE OF INCOME, CREDITS, DEDUCTIONS, etc." (CX 19, p.14). However, line A also contains the parenthetical command-added by the taxpayer, Beverly Heimann--to "SEE SCH. 2" *(Id.).* Schedule 2 informs that "SHAREHOLDER OWNERSHIP" changed from one-third each ownership among Jeffrey B. Heimann, Joe

Cali, and the taxpayer on December 31, 1990, to half ownership between Jeffrey B. Heimaun and Joe Cali, and "0" ownership by Beverly Heimaun on 12-31-91 (CX 19, p. 17). The Schedule states "on or about 1-2-91 the company retired the entire 33 1/3% interest of shareholder Beverly Heimann." (Id.) Thus, the tax return is complete, but not really accurate in its reporting. The result is that the ALJ is correct that the tax return is *incoiuistent* when it reports "0" stock ownership in 1991, but a $46,463 property distribution in that year to the taxpayer Beverly Heimann.

The $46,463 property distribution to Beverly Heimann was cash out of Royal at a time of great financial distress. It must be remembered that Beverly Heimann put no money in Royal, performed no duties, and was 'just a name" in a bogus vice presidency. I infer that the money really went to Robert S. Heimann, and that diverting cash to Robert S. Heimann through his figurehead wife was a deliberate withdrawal of Royal assets which served no apparent business purpose, other than to transfer cash to Robert S. Heimann.

14. In examining the testimony (Tr. 637-38) quoted by Respondents as disproving Complainant's point--that Robert S. Heimann took a half cut in his consultancy pay to bail out Royal--I find that Robert S. Heimann's testimony there actually supports Complainant more than Respondents. Complainant's point is merely that Robert S. Heimann cut his pay in half to help save Royal financially. Respondents say that Robert S. Heimann was merely trying to help his son, Jeffrey B. Heimann. Ultimately, of course, our question is who controlled Royal, and the fact that *Robert S. Heimann testified that it was his own idea* to become an

employee at Royal for half of his consultancy pay speaks volumes about who really controlled Royal. It borders on the absurd that a *true employee* would ask for management to impose a *50%* pay cut on that employee for the good of the company.

I find that Robert S. Heimann is attempting to take a perfectly legitimate parental feeling-helping one's offspring-and to pervert it to his selfish purposes, by defending his evasion of PACA-mandated responsibilities as nothing more than the activities of a generous dad. No, Robert S. Heimann owned and operated Royal by installing family and friends as figureheads in management roles, then he personally made the important decisions affecting his company, for his own reasons and purposes.

15. Respondents do not dispute the ALJ's exposition of the record, which clearly shows Robert S. Heimann, in the form of Continental Oil & Gas Corporation (which corporation was not a corporation, had neither oil nor gas, and which was really just an alias), made huge and numerous interest-free loans to Royal to keep Royal's checks from bouncing. Although I agree with the ALJ that Complainant's charge of kiting was not supported by the evidence, I have to ask just what can be inferred from this situation?

For one thing, Robert S. Heimann personally had an awful lot of cash, which interestingly enough does not show up on the myriad financial statements of Robert S. Heimann, Robert S. Heimann's wife, Robert S. Heimann's family, Robert S. Heimann's friends, Robert S. Heimann's produce corporations, or even on the

financial statements of Robert S. Heimann's alias, Continental, reproduced in this record (CX 61, pp.2021).

Also, Royal was *never* properly capitalized. When Royal was purchased by Robert S. Heimann from the Ribastes, the accounts receivable were to be passed back to the sellers (Ribastes). Moreover, the SBA "AUTHORIZATION AND LOAN AGREEMENT" for the $125,000 loan specifically paid off the Ribastes' ($116,000) promissory note, and left only "approximately $8,900 for working capital" (see TERMS OF LOAN § 3(b)(1), (2) (CX 61, p.3)). However, Joe Cali testified that this SBA loan was procured just because Royal was "very undercapitalized" (Tr. 386). The SBA loan did not add to Royal's capital position, other than to remove the *$15,000* monthly payment after the accounts receivable were repaid.

From all this, I infer that Robert S. Heimann *deliberatety* thinly capitalized his corporation, Royal, so that when it failed, or was shut down by a lawsuit--as the *Lange* litigation ultimately did to close Royal--there was very little of Robert S. Heima[m's money in Royal. (Robert S. Heimann presumably had experience with this financial end game from his days at Gilbert Brokerage, *infra.)* This is the real reason for the banking function performed by Robert S. Heimann, dibla Continental, and it was not for the stated purpose of helping his son, Jeffrey B. Heimann. Thus, the Respondents' argument 15 is rejected because it is without merit.

16. Respondents' allegedly *unsupported fiNding no.16* is really the central issue in this case: that Robert S. Heimann controlled companies from the background in order to escape PACA officials' investigations. My review

seeks to determine if a preponderance of the record evidence supports the ALJ's inferences. I would not reject an ALJ's findings because a Respondent proffers an alternate finding, or because the Respondent complains that the ALJ fails to attain a higher standard of proof than that required.

Although USDA's investigator testified that Robert S. Heimann was paid as a consultant (Tr. 336), he merely knew that "at some moment in time" he was told that Robert S. Heimann was "paid as a consultant" (Tr. 336) The significance of the form of payment *(vis-a-vis* employee or consultant) was not part of his answer. His testimony is not enough to outweigh the documentary and testamentary evidence on these payments. The record as a whole shows that Robert S. Heimann took $10,000 out of Royal on January 3, 1992, on January 27, 1992, and again on March 3, 1992 (Tr. 335) (presumably in addition to a $5,000-per-month salary), at a time of Royal's great financial distress.

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14. In examining the testimony (Tr. 637-38) quoted by Respondents as disproving Complainant's point--that Robert S. Heimann took a half cut in his consultancy pay to bail out Royal--I find that Robert S.

Heimann's testimony there actually supports Complainant more than Respondents. Complainant's point is merely that Robert S. Heimann cut his pay in half to help save Royal financially. Respondents say that Robert S. Heimann was merely trying to help his son, Jeffrey B. Heimann. Ultimately, of course, our question is who controlled Royal, and the fact that *Robert S. Heimann testified that it was his own idea* to become an employee at Royal for half of his consultancy pay speaks volumes about who really controlled Royal. It borders on the absurd that a *true employee* would ask for management to impose a *50%* pay cut on that employee for the good of the company.

I find that Robert S. Heimann is attempting to take a perfectly legitimate parental feeling-helping one's offspring-and to pervert it to his selfish purposes, by defending his evasion of PACA-mandated responsibilities as nothing more than the activities of a generous dad. No, Robert S. Heimann owned and operated Royal by installing family and friends as figureheads in management roles, then he personally made the important decisions affecting his company, for his own reasons and purposes.

15. Respondents do not dispute the ALJ's exposition of the record, which clearly shows Robert S. Heimann, in the form of Continental Oil & Gas Corporation (which corporation was not a corporation, had neither oil nor gas, and which was really just an alias), made huge and numerous interest-free loans to Royal to keep Royal's checks from bouncing. Although I agree with the ALJ that Complainant's charge of kiting was not supported by the evidence, I have to ask just what can be inferred from this situation?

For one thing, Robert S. Heimann personally had an awful lot of cash, which interestingly enough does not show up on the myriad financial statements of Robert S. Heimann, Robert S. Heimann's wife, Robert S. Heimann's family, Robert S. Heimann's friends, Robert S. Heimann's produce corporations, or even on the financial statements of Robert S. Heimann's alias, Continental, reproduced in this record (CX 61, pp.2021).

Also, Royal was *never* properly capitalized. When Royal was purchased by Robert S. Heimann from the Ribastes, the accounts receivable were to be passed back to the sellers (Ribastes). Moreover, the SBA "AUTHORIZATION AND LOAN AGREEMENT" for the $125,000 loan specifically paid off the Ribastes' ($116,000) promissory note, and left only "approximately $8,900 for working capital" (see TERMS OF LOAN § 3(b)(1), (2) (CX 61, p.3)). However, Joe Cali testified that this SBA loan was procured just because Royal was "very undercapitalized" (Tr. 386). The SBA loan did not add to Royal's capital position, other than to remove the *$15,000* monthly payment after the accounts receivable were repaid.

From all this, I infer that Robert S. Heimann *deliberatety* thinly capitalized his corporation, Royal, so that when it failed, or was shut down by a lawsuit--as the *Lange* litigation ultimately did to close Royal--there was very little of Robert S. Heima[m's money in Royal. (Robert S. Heimann presumably had experience with this financial end game from his days at Gilbert Brokerage, *infra.)* This is the real reason for the banking function performed by Robert S. Heimann, dibla Continental, and it was not for the stated purpose of helping his son,

Jeffrey B. Heimann. Thus, the Respondents' argument 15 is rejected because it is without merit.

16. Respondents' allegedly *unsupported fiNding no.16* is really the central issue in this case: that Robert S. Heimann controlled companies from the background in order to escape PACA officials' investigations. My review seeks to determine if a preponderance of the record evidence supports the ALJ's inferences. I would not reject an ALJ's findings because a Respondent proffers an alternate finding, or because the Respondent complains that the ALJ fails to attain a higher standard of proof than that required.

This part of the ALJ's text, which elicits a detailed, lengthy attack from Respondents (RAP at 14-18), makes only three inferences. One inference has to do with Robert S. Heimann's motive, and another with the likely effect on PACA officials of Robert S. Heimann's behavior while at UKC. The third states that Robert S Heimann could have refuted the UKC Consent Decision's form falsifications with his hearing testimony, but Robert S. Heimann did not do so.

Looking at the ALJ three inferences herein, I find that Respondents' arguments--that the ALJ inferences are *unsupported--are* not persuasive.

First, one need only ask if there is a good reason for Robert S. Heimann to avoid the appearance of holding a responsible position at Royal? The ALJ's deductive conclusion, or inference, that Robert S. Heimann "had good reason" to avoid the appearance of a responsible position at Royal is supported in the record, and is inclusive of Robert S. Heimann's entire career in the

produce industry. I find that Robert S. Heimann's reasoning had to include The Gilbert Brokerage Co. proceedings, because PACA officials considered them not finished *vis-a-vis* Robert S. Heimann, which Robert S. Heimann had to know, because he periodically telephoned PACA offices about his status, as explained, *infra.*

My examination of the five cases reproduced in the record, wherein The Gilbert Brokerage Co. was a Respondent in several 1970's era reparations cases, shows that Gilbert (Robert S. Heimann's company) unfairly (and without authority) billed produce purchasers, and was paid for produce, that should have been paid by the purchasers directly to the sellers, since the sellers had not granted actual or apparent authority to Gilbert to receive payment (CX 63). Gilbert did not give the collected receivables to any of the sellers, thereby violating its fiduciary duty as a broker (Tr. 525-26). However, all five of the cases against Gilbert were dismissed, even though Gilbert had defaulted, rather than defend itself. Dismissals occurred because sellers' reparations were originally sought *alternatively* against the other Respondents (the produce purchasers) along with Gilbert, and the produce purchasers' eventual liability in each case let Gilbert off the hook. I found no information in the record whether the other five Respondents (the produce purchasers) were able to go successfully after Gilbert for their money that was unfairly collected without authorization and megally converted by the broker, Gilbert. I greatly doubt that they ever saw their money.

(Parenthetically, I disagree with the ALJ's decision not to make a finding in the *Midland* proceeding,

discussed *infra,* whether the Midland application's Questions 1Oa and 1Oc were falsely answered because of the ALJ's stated unease with the evidence supporting an ongoing suspension and unpaid reparation awards. I later find herein that the Gilbert reparations cases, and Mr. Clark's testimony, contain a preponderance of the evidence that Robert S. Heimann was under ongoing suspension until records were produced, and had unpaid reparation awards.)

Helpfully, the Complainant has provided a list of other reparations cases contemporaneous to those, *supra,* where Gilbert defaulted, *but was ordered to pay reparations* (Complainant's Reply Brief at 6 (June 7, 1994)): *Simpson Sales Agency, Inc. v. The Gilbert Brokerage Co.,* PACA Docket No.2-4184 ($18,940.60 awarded May 3, 1976), 35 Agric. Dec. *514; Giumara Vineyards Corporation v. The Gilbert Brokerage Co.,* PACA Docket No. 2-4181 ($27,546.89 awareded May 3, 1976), 35 Agric. Dec. 514; Alfred Lagrange, Inc. v. The Gilbert BRokerage Co., PACA DOcket Nos. 2-4116 and 2-4117 ($535.00 and $5,856.25 awarded March 9, 1976), 35 Agric. Dec. 350; D.R. (Bud) Shaffer, Inc. v. The Gilbert Brokerage Co., PACA DOcket NO. 2-4087 (3,622.01 awarded March 10, 1976), 35 Agric. Dec. 351.

I take official notice of these cases under the Rules of Practice (7 C.F.R. Sec. 1.145(i)). Therefore, from the four default cases, and from the previous five "dismissed" default cases, supra, we learn that Gilbert performed unauthorized agency collections--thereby violating fiduciary duties by keeping the principals' money--and was also ordered to pay a total of $56,500.75 in unpaid reparations.

It appears that Robert S. Heimann just walked away from his company, The Gilbert Brokerage Co., leaving many industry members with large unfair losses. Since Gilbert had defaulted (meaning Gilbert put on no defense and submitted no documents) in all these cases, PACA Branch attempted to get Gilbert's records to determine the exact nature of Gilbert's violations, so that a disciplinary proceeding against Gilbert could be considered, in addition to the reparations decisions. (Tr. 525-6).

The testimony about Gilbert by USDA Marketing Specialist John Clark, and the objections to it by Respondents' counsel, concern the relevance of Robert S. Heimann's 1970's era violations to the case, sub judice (Tr. 513-26). However, whether there was actually a vaild permanent bar--or, as is detailed immediately, infra, whether the unproduced Gilbert documents in the 1970's could really prevent Robert S. heimann from getting a PACA license today; or in 1979 (when Robert S. Heimann testified that he first inquired of his status from the PACA Midwest Regional Office (Tr. 619)); *1984* (when Robert S. Heimann had approved UKC's attorney, Vince Vogler, to ask, presumably, PACA Branch in Washington, D.C., if Robert S. Heimann had a good PACA status (Tr. 619-20)); or *1988-89* (when Robert S. Heimann bought Royal and Royal applied for a license without Robert S. Heimann's name anywhere on the application (CX 2)))-*is not realty the ALJ's point.* All the ALJ said was that Robert S. Heimann *had good reason* for avoiding the appearance of holding a responsible position at Royal. What this means for Complainant's proof is that Complainant does not have to show that any of the things Respondents' counsel objected to are actuality true (although I believe them to be true);

Complainant has only to show that Respondent Robert S. Heimann *had good reason* to be worried that *PACA Branch believed them to be true,* and that PACA Branch would press that belief versus any Robert S. Heimann PACA license application--or, responsibly-connected status with any PACA licensee. John Clark testified that PACA "would have seriously considered questioning his (Robert S. Heimann's) fitness, based on not simply the fact that his license had been suspended in the 1970's, but in his actions as set forth in the reparation orders that were issued during that period" (Tr. 523-24).

Moreover, John Clark testified that the lack of records meant that PACA Branch could not audit the Gilbert Brokerage's breaking of the fiduciary duty of a broker, as follows (Tr. *525-26):*

[BY MR. PAUL]

Q. Sir, with respect to the failure of a broker to carry out his duties under the Act, is that the nature of the disciplinary investigation that would have been conducted had the records been obtained?

A. The exact nature of the audit that would have been made would have been on the basis of Mr. Heimann as a broker failing to carry out his duties in invoicing, collecting and remitting, in that he invoiced and collected - or, at least, the preliminary indications were that he issued broker's memorandums of sale which stated he was authorized to invoice, collect and remit. He did collect the funds but failed to remit those funds

and, therefore, violated his duty as a fiduciary and as a broker.

Q. And those were the allegations that could not be investigated without inspecting the records?

A. That is correct.

The Respondents' response to this testimony was Respondent Robert S. Heimann's hearsay testimony that Jack C. Morris, Midwest Regional Director of PACA, told him in late 1979 that he would have no problem getting licensed, as follows (Tr. 619 (emphasis added)):

[BY MR. KATZ]

Q. All right. And when you called Mr. Morris, what was your purpose in calling him?

[BY MR. HEIMANN]

A. To see how I stood as far as licensing in the PACA.

Q. And what did Mr. Morris tell you?

A. He lectured me on Gilbert to some extent and I asked him point blank could I get back in the business and could I get licensed and *he said the time element was probably that you would have no problem* getting licensed and we talked a little bit more and he asked me was I going to get in and I said, "I have no idea. I just wanted to clarify in my mind,'. and we hung up.

Also, Robert S. Heimarm testified that UKC's corporate attorney "had talked to Washington, D.C." and that there was "no problem" with Robert S. Heirnaim coniing back into the industry, or even having a license on his own, as follows (Tr. 619-20):

BY MR. KATZ:

Q. Now you indicated that in 1984, uh, you did get back into the produce business going to work for United K.C., is that correct?

I was contacted by United K.C., would I want to go to work for them and we sat down and talked about it and I said, "You know, I did have a problem," which Charlie Gallagher was the owner of United KC., and United Fruit & Produce in St. Louis, was aware of it. He said, "I am going to -- would it offend you if I had Vince Vogler.. .," who was the corporate attorney for United Industries, which owned both companies, check to make sure that I had no problem with the licensing. And I said, "I wish they would do it."

He contacted me back and told me that --

Q. When you say, he, who are you --

A. Vince Vogler contacted me back and told me that he had talked to Washington, D.C., and there was no problem with my coming back in this industry or if I even wanted a license I could get my own license. I had no problem. I said, thank you, and continued on as far as my employment contract and going to work for them. He was doing the due diligence, I presume for United Industries.

I have stated so many times in so many cases as to be a maxim, that I place great weight on the ALJ's determination of the credibility of witnesses, because the ALJ can observe the demeanor of the witness as he or she testifies. *(In re Floyd Stanley White, 47* Agric. Dec. 229, 278-79 (1988), *affd per curiam, 865* F.2d 262, 1988 WL 133292 (6th Cir. 1988)). Here the ALJ has taken directly contradictory testimony as to Robert S. Heimann's personal status with PACA Branch, first from a PACA specialist, and then from the Respondent. The ALJ's conclusion, that Robert S. Heimann "had good reason" to avoid a responsible position at Royal, means the ALJ believed USDA specialist John Clark, and not the hearsay testimony of Robert S. Heimann. I agree completely, and would have accepted Clark's testimony over Robert S. Heimann's, because Robert S. Heimann has so little credibility, as explained, *supra.*

Moreover, the hearsay ascribed to USDA's Jack Morris and UKC's attorney Vince Vogler is not reliable hearsay, not just because of the source (Robert S. Heimann), but because of the dubious nature of the information. My experience with the PACA Branch over my 46 years with the Department does not square with Robert S. Heimann's description of himself, an unrepentant violator--who has not produced demanded records, not paid reparations, and not repaid fiduciary funds--allegedly being told a mere 3 years after his reparations proceedings (1979) that he just come in for a license: "no problem."

The fact is that Royal's license application, number 9(a) asks, *inter alia,* if any of the proposed owners, officers, shareholders, or directors have any unpaid reparation awards. (CX 2, p.2.) Number 10 asks, *inter alia,* if any

employee of applicant has been the owner of a company whose license has been suspended or revoked, or against whom there are outstanding unpaid reparation awards (*id*). There are no year limitations on these questions, and Robert S. Heimann would have had to answer them to get licensed. Moreover, Robert S. Heimann would have had to answer "yes" to these questions because of the *Gilbert* cases, *supra,* if he answered truthfully.

Finally, on this point, the fact is that Robert S. Heimann continued to participate in the industry without *ever* taking a responsible position. If Robert S. Heimann believed himself clear of danger from the PACA Branch, why would he go through these legal facades to own and control produce companies, yet not openly be an owner, shareholder, director, or officer, and so forth? Robert S. Heimann was not even technically an employee under the license application, Question No.10, *supra,* but held himself out to be a consultant at UKC. No, I find Robert S. Heimann had good reason *not* to seek the kind of visibility to PACA officials that an application for a license, or holding a responsible position, would give Robert S. Heimann. Robert S. Heimann certainly has not acted like he thought he had "no problem with the licensing... and... there was no problem with my [Robert S. Heimann] coming back in this industry." (Tr. 620.) Robert S. Heimann consistently acted like he had something to hide.

In the final analysis, the choice is between John Clark, testifying firsthand as a PACA specialist, who says PACA would certainly investigate the entire career of Robert S. Heimann, should Robert S. Heimann seek re-entry in a responsible industry position and Robert S. Heimann, whose self-serving testimony is second and third hand

hearsay about what PACA officials allegedly said to him, or to third persons, about what PACA Branch might do if he attempted re-entry into the industry. This is not even a close call. The ALJ is correct that Robert S. Heimann had good reason to worry. I find Robert S. Heimann's attempt to show PACA officials as solicitous of his re-entry into the produce industry to be just not credible.

The preceding history of The Gilbert Brokerage Co. was necessary as a major part of the explanation for Robert S. Heimann's later domination and control of his companies from the background, behind the scenes, without the appearance of holding a responsible position.

The ALJ's second inference concerning the likely effect on PACA officials of Robert S. Heimann's episode at UKC brooks no real argument from Respondents. Correctly analyzed, the ALJ's conclusion goes to the likely effect upon PACA officials of three facts: (1) the PACA investigation of UKC, (2) Robert S. Heimann's departure from UKC, and (3) Robert S. Heimann's naming in the UKC Consent Decision as the designer and preparer of false inspection certificates, while Robert S. Heimann was general manager at UKC.

The ALJ merely stated that these facts would have put PACA officials "ill at ease" had they been aware of Robert S. Heimann's connection with Royal. The ALJ's conclusion is not predicated upon whether these three items happen to be true; but, rather, that these items are of the sort which get PACA officials' attention. Since there is no arguing that fact, Respondents are hard at arguing the "truth" of the items. Of course, these items continue to follow Robert S. Heimann around, because they have not been resolved, just as the Gilbert situation,

supra, was never resolved. But, whether the UKC items are true or not (I believe them to be true), it is still accurate to say, as the ALJ did, that these items would put PACA officials on alert, or "ill at ease." The ALJ then makes the reasonable inference that under these circumstances Robert S. Heimann would avoid the appearance of holding a responsible position at Royal.

Here is where the Respondents' arguments do come in, because, if Robert S. Heimann had been one of those who had duly applied for Royal's license (or later for Midland's), or for a responsibly-connected position at Royal or Midland, then the PACA Branch would likely have considered Respondents' present arguments in resolving Royal's license application, or assignment to a responsible position for Robert S. Heimann at Royal or Midland. But, Robert S. Heimann's name nowhere appears on Royal's license application, filed November 14, 1989, which only has Robert S. Heimann's wife, son and friend/co-worker (Joe Cali) as applicants (CX 2). Hereafter, then, Respondents are essentially "litigating" the truth of these points as if in such a licensing inquiry.

I find that Respondents have lost the argument that the ALJ's allegedly *unsupported finding no.16* is unsupported. Also, I conclude that Respondents are wrong on the truth of the facts Respondents argued in allegedly *unsupported finding no.16,* for the reasons below.

However, I must quickly state that there is no need to refute specifically all of Respondents' arguments, because the only issue is whether, as has been shown above, the PACA Branch would have been "ill at ease," thereby establishing "good reason" for Robert S. Heimann to avoid holding any responsible position at Royal. To the

extent, however, that Respondents appear to argue that Respondents' view of these circumstances allow Robert S. Heimann what one might call "peace of mind" in his situation, a response is indicated. But, the response is only indicated within the ALJ's second inference and its three facts, *supra.*

First, the *PACA investigation of UKC,* which was filed December 14,1989, alleged "false and misleading documents to [UKC's] suppliers to justify dumping and/or adjusting the price for fruits and vegetables [UKC] received" (CX 64). The record contains one of perhaps 25-30 such documents *signed by Robert S. Heimann,* which were the specific basis for suspending UKC's license (Tr. 109; CX 67). Robert S. Heimann was general manager of UKC during the pertinent time period and signed these documents; Robert S. Heimann was named in the Consent Decision as preparing the false and misleading documents (CX 64, p.5). I am not persuaded by Respondents' charge of Robert S. Heimann being a "scapegoat." Complainant was not directed by witnesses Breen and Perryman on what to put in the Consent Decision for Mr. Perryman' 5 signature. Complainant had the documentary evidence of Robert S. Heimann's false and misleading documents. Moreover, notwithstanding Respondents' argument, that because Robert S. Heimann was not named a Respondent in the UKC disciplinary proceeding, Robert S. Heimann should be exculpated, I find that just the above-listed facts fully support the ALJ's inference that the PACA investigation of UKC gave Robert S. Heimann good reason to remain behind the scenes at Royal, and later, at Midland. Also, I find that the fact that there existed at the time of the Consent Decision a 1980 Packers and Stockyards Act case (of which the PACA attorney may or may not have been

aware) which would support PACA Branch action against a general manager in certain similar situations (e.g., *MCM Livestock)* did not, and does not, limit, or otherwise militate against, Complainant's prerogatives and prosecutorial discretion, as the Respondents' seemingly argue.

Moreover, the nature of Respondents' arguments do not support a conclusion that Robert S. Heimann believed that he was in no danger from PACA Branch--just the opposite. The remainder of Respondents' arguments attack the testimony, motives, and behavior of Complainant's witnesses, Breen and Perryman; and attempt to put a clean suit of clothes on the bogus "State of Kansas Inspection Certificate," which has Robert S. Heimann's signature (CX 67; Tr. 105-10). These attempts are much less than persuasive, and are rejected. Thus, I find that the PACA investigation of UKC was certainly not something that would give Robert S. Heimann peace of mind.

Second, *Robert S. Heimann* 'S *departure from UKC* was predicated on the refusal by Robert S. Heimann to stop his "open billing" to Royal, a company in which his employer, UKC, knew he had perhaps a major interest, with Robert S. Heimann's family members and a former UKC employee (Joe Cali) at Royal (Tr. 117-25). Mr. Breen, an officer with the holding company, United Industries, Inc., which owned UKC, testified that when UKC's general manager is doing business with his son (at Royal), whether Robert S. Heimann owned Royal or not, "[i]t's something that we watched extremely close" (Tr. 80).

The full extent of Robert S. Heimann's misbehavior at UKC was not known to the purchaser of UKC, Mr. Perryman, until after Robert S. Heimann left to go to Royal, around June 1, 1989 (Tr. 101). Mr. Breen's testimony (Tr. 42-72) and Mr. Perryman's testimony (Tr. 94-164) are certainly supportive of the ALJ's conclusion that Robert S. Heimann had good reason to avoid a responsible position at Royal and at Midland. It is highly significant that the timing of the UKC Complaint, filed December 14, 1989, was just 6 months after Robert S. Heimann left UKC. I completely disagree with Respondents' argument that the ALJ should not have accepted the opinions of Breen and Perryman. These witnesses' testimony about the events in the pertinent time period certainly do not support Robert S. Heimann's "peace of mind" status.

The ALJ's third fact in the second inference is *the likely effect on PACA officials of the ,naming of Robert S. Heimann in the UKC Consent Decision for* design and *preparation of the false* and *misleading documents* (CX 64, p.5, #5). Robert S. Heimann's argument, again, is only examined to determine if he had "peace of mind" about the falsified forms. Robert S. Heimann's arguments include that his falsified form nevertheless accurately described the condition of the apricots, that Robert S. Heimann signed his own name--not a forged Kansas or Federal inspector's name--to the false documents, and that it was not shown that Robert S. Heimann successfully cheated anyone out of a penny. These arguments are almost comic on their merits; and really show the opposite of "peace of mind." These are really desperate attempts to mitigate a "caught red-handed" scenario.

The ALJ's third and final inference under No.16 is that Robert S. Heimann had the opportunity at the hearing herein to deny that he authored the false inspection forms, but he did not do so. Robert S. Heimann did not take the opportunity to deny he made the false inspection reports at UKC, because, Respondents argue, his testimony on this could have been seen as a waiver of their objection to admission of the document itself. Surely, this is a specious position when the issue is what Robert S. Heimann *believed* his status to be. The issue is not at this juncture whether it is true that he authored and signed the bogus documents to deceive suppliers, but rather, how the situation *looked* to PACA officials. Robert S. Heimann does not bolster his "I'm not worried" stance, when he uses this kind of technical refusal as an excuse not to deny culpability. As Respondents well know, in a Federal administrative proceeding, formal evidentiary rules do not apply, in order to, *inter* alia, make the most complete record for a reviewing court. Very little relevant evidence of any material value is excluded by USDA's ALJ, and they virtually always admit all relevant evidence with my blessing. I find that Respondents' excuse for not denying at the hearing that Robert S. Heimann participated in the falsification of the UKC bogus State of Kansas inspection form is unpersuasive, and is thus rejected.

17. The ALJ is correct that Royal was the *alter ego* of Robert S. Heimann. In Respondents' allegedly *unsupported finding no.17,* Respondents are repeatedly wrong about there being no evidence of the following important facts. Robert S. Heimann was the actual owner because Robert S. Heimann and Beverly Heimann bought Royal with a promissory note in the Sales Agreement both signed on July 8, 1988, as explained in Respondents'

allegedly *unsupported finding no.1, supra.* As far as Robert S. Heimann benefits from Royal as owner, including profits and tax losses, this has already been established in Respondents' allegedly *unsupported finding no.13, supra.*

Moreover, my analysis of Respondents' allegedly *unsupported finding no.13* reveals a robust funds exchange between Royal and Robert S. Heimann's phony corporation, Continental, which funds exchange is well beyond anything as minor as a commingling of Robert S. Heimann's personal and corporate funds.

When Robert S. Heimann supposedly "sold" Royal to his wife, son and a family friend, Royal's management purportedly consisted of Robert S. Heimann's inexperienced (approximately) 21-year-old son (Jeffrey B. Heimann), the inexperienced (approximately) 21-year-old friend (Joe Cali), and Robert S. Heimann's wife (in an admitted figurehead vice presidency). Robert S. Heimann's vehicle for control was to be "just" a consultant, but the consultancy's corporation (Continental) was not even incorporated. The consultancy was just Robert S. Heimann, d/b/a Continental, as already explained in Respondents' allegedly *unsupported finding no. 15, supra.* Robert S. Heimann was shown to do the vast majority of buying and selling at Royal. Therefore, Respondents' "missing" facts, which supposedly support Respondents' calling *alter ego* "a curious theory," are not "missing" at all. Therefore, I reject Respondents' arguments in this regard.

Robert S. Heimann was the actual owner, and would have continued to exercise dominion and control after Robert S. Heimann (presumably, Respondents also meant

to argue that Beverly Heimann participated in any "sale" as she was co-owner) supposedly "sold" Royal to Jeffrey B. Heimann, Joe Cali, and Beverly Heimann, "selling" each a one-third share. Thus, Beverly Heimann, as Robert S. Heimann's wife, still supposedly retained one-third of Royal after the "sale." If a husband's wife owns *50%* of their company, and they "sell" his half, and part of her half, leaving her 33 1/3%, *he is still an owner* by marriage. But, it is not evident on this record that Robert S. Heimann ever actually "sold" Royal to anyone. Robert S. Heimann never got money for the "purchase" of Royal from Joe Cali or Jeffrey B. Heimann (and certainly not from Beverly Heimann). Royal got an SBA-guaranteed loan to pay off its mortgage with the Ribastes. And another SBA-guaranteed loan was secured to move to, and to remodel, a new warehouse. But, at no time, I find, was Royal not under the tight control of Robert S. Heimann.

It is important at this juncture to note that under no theory of his participation at Royal will Robert S. Heimann escape the Secretary's disciplinary reach under PACA. Three possibilities exist to explain Robert S. Heimann's status at Royal: (1) the ALJ has held that Robert S. Heimann is an owner, because he purchased Royal from the Ribastes, and there is no evidence that Robert S. Heimann ever sold it, and Royal is his *alter ego;* (2) the ALJ has held that, even if Robert S. Heimann sold his portion of Royal to the other Respondents (Jeffrey B. Heimann, Joe Cali, and Beverly Heimann), his wife, Beverly Heimann, retained a one-third interest, and Royal was the *alter ego* of Robert S. Heimann; and (3) the Complainant argued, and I agree, that even if Robert S. Heimann had divested himself of any ownership interest in Royal including none in his wife, he would still be

directly responsible for the willful, flagrant and repeated violations of PACA's section 2(4) because he fit within the definition of a "dealer" under section 1(6) of the PACA (7 U.S.C. § 499a(6)) in connection with the payment violations (Complainant's Proposed Findings of Fact, Conclusions, and Order, pp.34-36 (May 6, 1994); Response to Respondents' Appeal, p.18 (Oct.31, 1994)).

In the first instance, I have already agreed with the ALJ that Robert S. Heimann never relinquished ownership of Royal, except on paper. Since Royal had the corporate form, it is well-settled that where there is dominion and control by an owner, the corporate veil is pierced and the owner held personally for the violations because the corporation is merely the owner's *alter ego.* (See *In re Lloyd Myers Co., 51* Agric. Dec. 747, 769-72 (1992), *aff'd, 15* F.3d 1086, 1994 *WI-* 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994).)This case, *sub judice,* has a great deal in common with the *Lloyd Myers* consolidated case, not only because both cases concerned failure-to-pay violations and false and misleading statements on a license application, but, also, because both Respondents were found to have the involved company as his *alter ego.* The ALJ found (Initial Decision at 25) that the *Myers* proceeding was directly on point, that (51 Agric. Dec. at 767):

The Department is properly concerned with who is in control of the business entity when any violations of Federal statutes (and/or USDA regulations emanating therefrom) occur. As will be explained, infra, the Department routinely searches for the *alter ego(s)* of an offending corporation, so that any imposed sanction may also run against the individual(s) actually responsible for

the corporate misbehavior, if appropriate in the context of the case.

The context under scenario (1) is that the ALJ found that Robert S. Heimann was the 100% owner, and that the other individuals involved in "ownership" were there merely to insulate Robert S.Heimann from the investigatory eyes of PACA officials. Therefore, Robert S. Heimann would come squarely under the great number of cases where the 100% owner is found to have the corporation as his/her *alter ego.*

The second scenario would still have Royal as Robert S. Heimann's *alter ego,* as the ALJ found, because Robert S. Heimann's wife had a one-third share ownership, and he dominated the company. I completely agree with the ALJ, based upon *In* re *MCM Livestock, Inc.,* 39 Agric. Dec. 893 (1980), that a general manager, who exercises great dominion and control, but, who only owns shares through his wife, is nonetheless responsible under the *alter ego* theory. In fact, the portion of *Syracuse Sales,* which Respondents cited in their Appeal Petition, supra, at 19, really supports Complainant's position as follows:

Both the Secretary and the federal courts, in the majority of cases utilizing the *alter ego* doctrine, have pierced the corporate veil in order to hold <u>owners</u> of corporations liable, as the above definition would imply. *See,* e.g., *Labadie Coal Co. v. Black,* 672 F2d 92 (D.C. Cir. 1982) (corporate director, president and sole employee whose wife was majority shareholder); *In* re *MCM Livestock, Inc.,* 39 Agric. Dec. 893 (1980) (two corporate officers whose wives together hold 100% of corporate stock).

Concerning the third scenario, I agree with Complainant that the ALJ could have found a third basis for Robert S. Heimann to be held responsible for Royal's stipulated payment violations--that Robert S. Heimann was a "dealer" under the Act who personally was responsible for the vast majority of the stipulated payment violations. Respondents argue that Robert S. Heimann never had any ownership of Royal, and that Beverly Heimann had had her Royal shares retired "on or about January 2, 1991" (CX 19, p.17). I do not agree, but even if this non-ownership were true, Robert S.Heimann would still be disciplined for his violations because he fit the definition of a "dealer" under the PACA, as follows (7 U.S.C. § 499a(b)(6)):

(6) The term "dealer" means any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce....

Complainant made this argument in its Brief, supra, at 34-36, and raised it again in Complainant's Response, *supra,* at 18, that Robert S. Heimann fit the definition of a "dealer," *supra,* and that section 2(4) of the PACA (7 U.S.C. § 499b(4)) specifically includes dealers in its prohibition of unfair practices. Therefore, with the knowledge that Robert S. Heimann was the day-to-day manager of Royal, exercising direction, management and control of the day- to-day dealer operation of Royal, and the one individual most responsible for the corporate violations, Robert S. Heimann is subject to the Act. I find that there is no significant difference between Robert S. Heimann's situation and the situation of John Knopp in *Syracuse*

Sales, as Complainant has argued all along, as follows *(In re Syracuse Sales Co.* (Decision as to John Knopp), *52* Agric. Dec. 1511, 1519-21(1993), *appeal dismissed,* No.94-9505 (l0th Cir. Apr.29, 1994)):

The prohibition against unfair practices found in section 312(a) of the Act (7 U.S.C. § 213(a)) applies to stockyard owners, market agencies and dealers.... The Act defines "dealer" as any person, not a market agency, engaged in the business of buying and selling livestock in commerce, either on his own account or as the employee or agent of the vendor or purchaser. 7 U.S.C. § 201(d).

Syracuse is registered as a dealer and a market agent under the Act. Mr. Knopp managed the day-to-day operations of the business and solicited prospective vendors throughout the region. (Tr. 213-15)....

In *In re Chatham Area Auction Coop., Inc.,* 49 Agric. Dec. 1043 (1990), the Secretary found the corporate manager of a stockyard to be subject to the Act, making the order and sanctions applicable to him as well as the corporate respondent. *Id.* at 1077, 1095-96....

. . . The *Chatham* decision emphasizes the need to hold a corporate manager accountable for corporate violations of the Act when the evidence shows that the manager was responsible for the violations....

Although it was not a disciplinary proceeding under the Act, *Fillippo v.S. Bonaccurso & Sons, Inc.,* 466 F. Supp. 1008 (E.D. Pa. 1978), examined issues closely analogous to those in the instant case.... . . The corporate defendant

admitted that it was a "packer" under the Act, whereas the individual defendants admitted they were officers of the corporate defendant but denied they were "packers" under the Act and denied any liability for the corporate defendant's violations under the Act. *Id.* at 1016.

. . . The court concluded that (an individual defendant] was liable as a "packer" for his acts, omissions, or failures that were committed on behalf

of the corporate defendant and which violated the plaintiff's rights under the Act. *Id.* at 1018....

. . . .

The *Chatham* and *Fithppo* cases support the conclusion in the instant case that respondent Knopp, as manager of the day-to-day operation of the corporate respondent, was subject to the Act. Under the ruling in *Chatham,* respondent Knopp, as manager exercising direction, management and control over the day-to-day dealer operations of Syracuse and as one of the individuals responsible for the corporate violations, is subject to the Act.

I find that Complainant is correct that the situation described, between dealers regulated under PACA and the P&S Act, is strictly analogous. Therefore, I make the finding that Robert S. Heimann, a "dealer," as defined under the PACA (7 U.S.C. § 499a(b)(6)), and in connection with Royal Fruit, have committed willful, repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

18. Respondents here attempt three arguments: (1) to raise a "straw man" argument and then knock it down: to wit, that Complainant acknowledged (in its Brief at 36) Susan Heimann's legal capacity to perform this role--ownership of Midland--and then prosecuted her anyway because she did not ferret out the fact that her father actually owned the firm. Respondents also argue (2) that Susan Heimann received, and paid taxes on, Midland's net profits. Respondents' other point (3) is essentially one of "how can you hold Susan Heimann for her failure to identify Robert S. Heimann as the true owner when even the analytical expert, Complainant, incorrectly concluded that Jeffrey B. Heimann was also a true owner and principal of Midland?" I reject all of the Respondents' arguments in Respondents' allegedly *unsupported finding no.18.*

The straw man question (1) is of Susan Heimann's legal capacity to own Midland, which issue the ALJ has not addressed, and which therefore is a phony issue. Likewise, Susan Heimann's personal analytical powers, and (2) Susan Heimann's tax payments purportedly paid on Midland's behalf, are irrelevant. As the ALJ correctly wrote in his Initial Decision and Order, "intent is not a part of the offense," properly relying on the reasoning in *Perfect Potato* and *Lloyd Myers.* Thus, the ALJ was

correct to conclude that the license-application listing of Susan Heimann as sole shareholder, officer, and director, was misleading on its face *to the PACA* examiners. Whatever was in Susan Heimann's mind (her intent) about all of this is of no consequence. The salient fact is that the true owner's name, Robert S. Heimann, was absent from the application.

Complainant's reply to (3) Respondents' criticism of Complainant's ultimately rejected (by the ALJ) allegation that Jeffrey B. Heimann is also an *alter ego* of Midland is that the credible evidence could have supported the Complainant's longstanding, proffered conclusion that Midland was the *alter ego* of both Robert S. Heimann and Jeffrey B. Heimann. However, Complainant continues that the record fully supports the ALJ's conclusion that Robert S. Heimann exercised virtually complete control over the buying and selling of produce at Midland, and, thus, Midland was solely Robert S. Heimann's *alter ego.* I agree with Complainant, both that Midland was properly found to be solely Robert S. Heimann's *alter ego;* but, that the evidence could have found Midland to be the *alter ego* of both men.

19/20. Respondents' argument that the ALJ erred in concluding that Midland was a "mere continuation" of Royal is based upon Missouri corporation law controlling the "successor" status of PACA corporations, in derogation of the Secretary of Agriculture. If Respondents were to prevail on this issue, then the ALJ would be in error that the answer to Question 11 on Midland's PACA application is false and misleading; to wit, Midland does not "succeed another firm" (CX 26, p.6, Question No. 11).

This conflict of laws issue was addressed in a much-related way in *Lloyd Myers, supra,* where the Ninth Circuit affirmed the Secretary's reasoning that, under PACA, State corporation law does not control when the Federal Regulatory Agency is applying *alter ego* theory, as follows (51 Agric. Dec. at 769-70) (emphasis in original):

> **The position taken by Respondent(s) is not unique in this type of case, where the *alter ego* of a corporation maneuvers to escape the reach of the Federal Regulatory Agency. However, as the case law below clearly shows, the position is totally without merit. The laundry list of arguments above differs in no substantial way from the position of a California Respondent in a similar proceeding in *Sebastopol Meat,* in which the Ninth Circuit decided against that Respondent's position, as follows (text taken from *in re Central Packing Co.,* 48 Agric. Dec. 290, 311-13 (1989) (emphasis added)):**
>
> > **Respondents contend that Colorado law applies in determining whether the corporate veil should be pierced, and that this case does not meet the piercing criteria under Colorado law (Appeal Petition at 3-6). However, it is well settled that in circumstances such as are involved here, the *corporate veil may be pierced* in *order to make the order applicable to the responsible directing officials and***

owner, or part owner, of a corporation involved in violations of a federal regulatory statute.[31] *State laws are not controlling as to this matter. .*

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[31] *Sebastopol Meat Co. v. Secretary of Agriculture*, 440 F.2d 983, 983-86 (9th Cir. 1971); *Bruhn's Freezer Meats v. USDA*, 438 F.2d 1332, 1342-43 (8th Cir. 1971); [*In re Stull meats, Inc.*, 49 agric. Dec. 309, 327-28 (1990) (decision as to Globe Packing Co. and Reuben Krasn), *appeal dismissed,* No. 90-70191 (9th Cir. Jan.11, 1991); *In* re *Andersen Dairy, Inc.,* 49 Agric. Dec. 1, 9-16 (1990)]; *In* re Great *American Veal, Inc.,* 48 Agric. Dec. [183, 200-01, *aff'd,* 891 F.2d 281 (3d Cir. 1989) (unpublished)]; *In* re *Johnson-Hallifax, Inc.,* 47 Agric. Dec. [430, 435 (1988)]; *In* re W*hite,* 47 Agric. Dec. [229, 311 (1988)], *aff'd per curiam, [865* F.2d 262, 1988 W.L 13392 (6th Cir. 1988)]; *In* re *Holiday Food Servs., Inc.,* 45 Agric. Dec. 1034 (1986), *remanded,* 820 F.2d 1103 (9th Cir. 1987); *In* re *Corn State Meat Co.,* 45 Agric. Dec.995 (1986); *In* re *Trenton Livestock, Inc.,* 41 Agric. Dec.1965, 1971-80 (1982); *In* re *Pastures, Inc.,* 39 Agric. Dec. 395, 397, 401(1980); *In* re *Thomaston Beef & Veal, Inc.,* 39 Agric. Dec. 171(1980); *In re Norwich Veal & Beef, Inc.,* 37 Agric. Dec. 1202, 1205 (1978);

In re Mid-States Livestock, Inc., 37 Agric. Dec. 547, 566-68 (1977), *affd sub nom. Van Wyk v. Bergland*, 570 F.2d 701(8th Cir. 1978); and *see Corn Products Refining Co. v. Benson*, 232 F.2d 554, 565 (2d Cir. 1956); *Hedrick v. S. Bonaccurso & Sons, Inc.*, 466 F. Supp. 1025, 1030-31 (E.D. Pa. 1978); *Fillippo v. S. Bonaccurso & Sons, Inc.*, 466 F. Supp. 1008, 1015-18 (E.D. Pa. 1978); *In re Rotches Pork Packers, Inc.*, 46 Agric. Dec. 573 (1987); *In re MCM Livestock, Inc.*, 39 Agric. Dec. 893, 900-02 (1980).

There is no question but that Royal's *alter ego,* Robert S. Heimann, is herein maneuvering to escape the Secretary's regulatory reach. Moreover, the ALJ specifically concluded (and I agree) that the same *alter ego* analysis which applied to Royal also equally applies to Robert S. Heimann's relationship with Midland (Initial Decision at 34). The cases in footnote 31 of *Central Packing, supra,* illustrate the substantial numbers of Federal administrative cases where the corporate veil is pierced, e.g., to prevent owners, an *alter ego,* or other responsible directing officials, from maneuvering to escape the reach of the Federal regulatory statute.

However, Respondents' argument herein is on a little different tack than *alter ego,* in that Respondents are arguing that Missouri corporation law and precedents should

control whether Midland was the successor corporation to Royal. The ALJ determined that a PACA case, *Skyline, supra,* controlled the case, *sub judice,* on the question of successor corporations. In so deciding, the ALJ specifically rejected Respondents' earlier arguments that *Skyline* supported Respondents' position that Midland was not a successor corporation to Royal (Initial Decision at 29). An examination of Respondents' appellate argument, and the Missouri precedents cited *(Brockmann),* reveal that the key Missouri State determination concerns liability for the transferor's debts *vis-a-vis* the successor corporation. *Skyline* has a different approach to successor corporations because the Secretary has different interests--emanating from the Congressional mandates embedded in PACA--than the interests of the State of Missouri. For instance, whereas the State emphasizes capital formation and corporate debt liability, the Secretary emphasizes management and control, experience, and personal capital involvement.

While the Secretary is interested, under PACA, in the personal *responsibility* of those operating in violation of the PACA, the State of Missouri is interested, *inter* alia, in determining corporate *debt liability.* These issues, *inter* alia, were addressed in the remainder of the quotation from *Central Packing* in *Lloyd Myers, supra,* at 51 Agric. Dec. 770-72, as follows (emphasis added in *Lloyd Myers):*

> **As stated in *Sebastopol Meat Co. V. Secretary of Agriculture,* 440 F.2d 983, 984-86(9th Cir. 1971):**

> **Singleton argues that the doctrine of *alter ego* was improperly applied - and that therefore the order should be modified to delete the provisions making it run against him individually. He contends that *in the absence of a showing of a fraudulent or inequitable result the corporate entity of Sebastopol should not be disregarded.* In so arguing, *Singleton relies on California cases* which say that fraud or an inequitable result is required as a predicate for application of the concept of *alter ego*....**

We do not think that state law limitations on the *alter ego* theory or doctrine are necessarily controlling in determining the permitted scope of remedial orders under federal regulatory statutes. See generally Goodman v. F.T.C., 9 Cir., 1957, 244 F.2d 584, 59O~591. As we there said:

> **"However, when interpreting a statute the aim of which is to regulate interstate commerce and to control and outroot some evil practices in it, the courts are not concerned with the refinements of common-law definitions, when they endeavor to ascertain the power of any agency to which the Congress has entrusted the regulation of the business activity or the enforcement of standards it has established."**

Sebastopol is a creation of the state, and the state courts can undoubtedly define and limit the state's *alter ego* doctrine in applying the state's laws to Sebastopol. The doctrine of *alter ego* is usually invoked in state courts in private litigation, for the purpose of defeating the normal rule of state law that the corporation shields its owners from liability for its obligations. Since the shield was deliberately created by the state to encourage the formation and use of capital, it is not surprising that state courts impose rather stringent limitations upon a doctrine that is designed to remove the shield.

It does not follow that state limitations on the doctrine must be accepted in the application of federal regulatory statutes. In the case before us, the purpose of the cease and desist order is to insure that the regulation will not be thwarted by continued unlawful conduct. *It does not impose personal liability upon Singleton for past* acts.[32] We think it

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[32]**However, a civil penalty or suspension order frequently imposes personal liability on an individual for past acts, under the *alter ego* doctrine, as was done in many of the cases cited in note 31, *viz., Great American Veal, Johnson-Halifax, White, Holiday Food, Corn State,Trenton Livestock, Pastures, Thomaston Beef, Mid-States, Rotches, and MCM livestock.***

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quite unrealistic to say, in view of the findings that we have quoted, that Sebastopol did the acts charged but that Singleton did not. Everything that Sebastopol did, Singleton did, because Sebastopol, for all practical purposes, was Singleton; he was the substance; Sebastopol was the shadow. The phrase *"alter ego"* is an

apt description of the Sebastopol Singleton relationship. But there is no magic in the phrase; it is the substance that matters. We decline to hold that the Secretary can order only the shadow to cease and desist. To do so would be to reject fact in favor of fiction.

The only case authority dealing with the power of the Secretary, under this statute, to issue a cease and desist order against an individual on the basis of acts done by a corporation, is Bruhn's Freezer Meats of Chicago, Inc., et al. v. United States Dept. of Agriculture, 8 Cir., 1971, 438 F.2d 1332. That case differs in its facts, but is authority for the power of the Secretary to issue such an order. There are many cases that stand for the general principle that the mere form of a business organization is insufficient to shield the practices sought to be prohibited from the reach of a federal regulatory agency. *See, e.g.,* Electric Bond & Share Co. V. S.E.C., 1938, 303 U.S. 419, 440, 58 S. Ct. 678, 82 LEd. 936; F.T.C. v. Standard Education Society, 1937, 302 U.S. 112, 119-120, 58 S. Ct. 113, 82 LEd. 141; H.P. Lambert Co. v. Secretary of Treasury, 1st Cir., *1965,* 354 F.2d 819, 822; Joseph A. Kaplan & Sons, Inc. v. F.T.C., D.C. Cir., 1965, 121 U.S. App. D.C. 1, 347 F.2d 785, 787, n. 4; South Carolina Generating Co. V. F.P.C., 4 Cir., 1958, 261 F.2d 915, 920; Corn Products Refining Co. V. Benson, 2 Cir., 1956, 232 F.2d 554, *565;* Keystone Mining Co. V. Gray, 3 Cir., 1941, 120 F.2d 1, 6; Alabama Power Co. V. McNinch, D.C. Cir., 1938, 68 App. D.C. 132, 94 F.2d 601, 618; and our own decisions in Tractor Training Service v. F.T.C., 9 Cir., 1955, 227 F.2d 420, 425; Goodman v. F.T.C., 9 Cir., 1957, 244 F.2d 584, 593-594.

It is true that none of these cases, except *Bruhn's Freezer Meats, supra,* deals with the Act that is here applicable. It

is also true that it would be possible to distinguish each of them, on its facts, from the facts of this case. Nevertheless, we think that the principle that they announce is applicable here. It is obvious to us that a cease and desist order directed to both Sebastopol and Singleton is far more likely to assure future compliance with the Act than one directed to Sebastopol alone. *It is equally obvious that in reality it was Singleton who committed the violations.*

I agree with Complainant that the Secretary should no more be constrained by State law on successor corporation status than on *alter ego* liability status. The PACA violator's ability to leap into the next corporate entity to escape the Secretary's regulatory reach should be non-existent. Those individuals who use corporate devices to evade Packers and Stockyards Act and PACA financial requirements are some of the most financially irresponsible Respondents I have seen in my 46 years at USDA. Virtually every corporate entity involved herein--Gilbert, UKC, Royal, Midland--has failed miserably, and with great financial loss to many innocent corporate and individual industry members. Basically, those that suffered this fate are those unfortunate enough to have done business with Robert S. Heimann.

I find that Royal Corporation transferred to successor Midland Corporation everything that it had to give; minus, of course, that extracted from Royal through the PACA trust litigation, by the PACA trust beneficiaries. I find that there is no real question but that Midland succeeded Royal. Respondents' desperate attempt to use Missouri corporations law to shield Robert S. Heimann from his day of reckoning for his decades of financial irresponsibility is rejected.

21. The ALJ's obvious point, which Respondents argue is unsupported, is that a sole shareholder, who is the sole officer and director of a corporation, needs to be actively involved in the management of the corporation. In the context of the ALJ's larger point--that "Robert S. Heimann was the true principal at Midland, actively involved in the direction and control of virtually every significant aspect of the firm's operations" (Initial Decision at 31)--Susan Heimann would have to be shown to have had very little involvement in the management of Midland in order for the ALJ's point to be "supported."

The ALJ lists many items which indicate how very little time, money, expertise, or experience Susan Heimann brought to Midland. Similarly, Midland did not list her as an employee, she received no compensation, and she got no distributed earnings. The ALJ convincingly shows Susan Heimann to be a figurehead. In this context, the ALJ's ultimate point is supported, in that Susan Heimann had so little involvement with Midland, that to list her on the license application as the principal, instead of Robert S. Heimann, is misleading on its face.

I completely agree. Moreover, I agree with Complainant that, when a corporation applies to participate in a highly-regulated industry, and the regulatory scheme requires licensing and disclosure of the identities of officers and their ownership interests, a figurehead cannot be lawfully utilized to mislead the regulatory agency. Concealment of the true principal by substituting Susan Heimann as sole officer, director, and shareholder, defeats tbe public protection purpose of the PACA. I also agree with Complainant that using a bare, legal facade, which might meet applicable State incorporation legal requirements, could still be (and

certainally is herein) a misrepresentation, concealment, or withholding of facts in violation of section 8(c) of the PACA (7 U.S.C. § 499h(c)).

The ALJ listed the multitudinous duties Robert S. Heimann performed at Midland, and quoted Robert S. Heimann that "1've got to worry about everything.... I have the responsibility of everything on my back." (Initial Decision at 31). The ALJ is correct that Robert S. Heimann was the true principal at Midland.

22. I disagree with Respondents that the lack of compensation to Susan Heimann is of no significance. When Susan Heimann's lack of pay from Midland is combined with the really minimal contact she maintained with Midland, Susan Heimann's figurehead status is even more clearly defined. Moreover, the Complainant accurately points out that what little money did go to Susan Heimann was merely funneled through her to pay Midland's taxes. I reject Respondents' arguments because Susan Heimann had so very little to do with Midland, that, despite the legal maneuvers and tax compliances and payments cobbled together by Respondents, there is no way a reasonable person could find that Susan Heimann actually owned, managed, and controlled Midland.

23/24. Respondents make several arguments attempting to show that the ALJ erred when he cited *Perfect Potato* and *Townsend* as "strikingly similar" to the cases, *sub judice.* As Complainant points out correctly, Respondents' argument herein is based upon the flawed premise that Robert S. Heimann neither had an interest in Royal, nor played any management role in key management decisions--apart from buying and selling produce. Respondents are also wrong that Robert S. Heimann only

managed Midland and was not the beneficial 100% owner of Midland. This is manifestly contrary to the great body of record evidence, as explicated, *supra,* in the ALJ's *Royal* analysis, and in my affirmance of the ALJ's conclusions.

Respondents' arguments Nos. 23 and 24 are rejected, for the many foregoing reasons and because *Perfect Potato* and *Townsend* are strikingly similar.

25. I reject Respondents' final argument that the ALJ's conclusion is unsupported that Robert S. Heimann was the beneficial owner of 100% of the Midland stock ostensibly owned by Susan Heimann. The Respondents also argue that this conclusion violates the USDA *alter ego* policy. However, as Complainant points out, the rationale previously stated for holding Robert S. Heimann to be an *alter ego* and owner of Royal equally applies to Midland (see Respondents' allegedly *unsupported finding no. 17, supra).*

I agree with Complainant that the suggestion that Robert S. Heimann was unaware of, and not responsible for, Susan Heimann's false and misleading answers on the PACA licensing application is just not believable. Respondents' scenario would require belief that a bookkeeper, Karen Ward, procured a PACA license application, filled it out on her own, consulted by phone with Susan Heimann, and forged Susan Heimann's name--all without Robert S. Heimann being aware of any of it. The ALJ had correctly noted that Robert S. Heimann had testified in related litigation that "I've got to worry about everything.... I have the responsibility for everything on my back" (see Respondents' allegedly *unsupported finding no.21, supra).* The Complainant

summarized the extent of Robert S. Heimann's "responsibility" in this way (Complainant's Response, *supra,* at 23):

Robert Heimann was more correct than he knew when he made that statement [about "responsibility for everything"]. He has responsibility for the failure to make full payment violations of Royal Fruit as an alter ego of Royal Fruit and a "dealer" in connection with the produce operation, he was an alter ego of Midland and also a dealer in connection with its produce operations; and he was also the individual most responsible for the submission of a license application containing false and misleading representations.

I completely agree with Complainant's analysis, *supra,* that Robert S. Heimann was responsible for these transgressions, above. I note that Robert S. Heimann also was responsible for the *Gilbert* fiasco, and the closing of UKC.

III. Judicial Officer's Finding That Questions 10a and 10c of Midland's License Applications Were Falsely Answered.

Although neither party raised this issue on appeal, I am addressing the fact that the ALJ did "not make a finding as to whether Midland's application contained a false statement in connection with Question 10" (Initial Decision at 34), which states (Initial Decision at 33):

> Has any person partner, officer, stock of a firm, employed by the applicant been the individual owner, director, or holder of

more than 10% of the outstanding association or corporation:

a. Whose license is under suspension or has been revoked?
b. Who has been found to have committed any flagrant or repeated violations of the Act?
c. Against whom there is an unpaid reparation award? I find that Questions 10a and 10c were falsely answered "no," when the required answer is "yes" to both. This issue was vigorously litigated at the hearing, and was the subject of extensive pleadings and arguments.

As has been repeatedly stated herein, the standard of proof is a preponderance of the evidence. I find that there is much more than a preponderance of the evidence that Gilbert's license was, in fact, suspended for the violations which are detailed in my analysis in response to Respondents' allegedly *unsupported* finding *no.16, supra.* Moreover, because the demanded *Gilbert* records were not produced, Robert S. Heimann was under a *continuing suspension,* until such time as the records were produced. This finding is based upon both documentary evidence, i.e., the *Gilbert* cases; and the testimony of John Clark, who had a personal recollection of these cases. Moreover, Mr. Clark testified that the *Gilbert* records were demanded of Robert S. Heimann to enable PACA official Jack Morris to prepare a disciplinary proceeding against Gilbert, and its president and owner, Robert S. Heimann, but Robert S. Heimann refused to produce such records, as follows (Tr. 521-22):

BY MR. PAUL:

Q. Mr. Clark, are you familiar with an attempted disciplinary investigation into the activity of Gilbert Brokerage in the mid-1970's?

[BY MR. CLARK]:

A. Yes.

Q. Was Mr. Robert Heimann the president and owner of that firm?

A. Yes, he was.

Q. Was he requested to produce records after the collapse and closing of Gilbert Brokerage?

A. Yes, he was.

Q. And were those records produced?

A. They were not produced.

Q. And as a consequence of Mr. Heimann's failure to produce the records, is there a procedure under which he becomes subject to sanction under the Act?

A. I believe that, pursuant to Section 13 of the Act - it's either 9 or 13 and I believe it's 13 -- when a person -- a firm - refuses to produce records, they are given a notice warning them that, if they fail to produce the records within 10 working days, their license will be automatically suspended until such time as the records are made

available. In this case, the investigator, who happened to be Mr. Jack C. Morris, who was the Regional Director at that time of the Chicago office, returned to St. Louis 10 days following the service of the demand letter, and he was again refused the records.

Based upon this evidence--documentary and testimonial-I find that there was a continuing suspension against Robert S. Heimann, which should have been recorded by Susan Heimann (or Robert S. Heimann) in Answer lOa as "yes." Respondent vigorously objected to Complainant's pursuit of this issue (Tr. 515-21, 522-24, 527, 532, *534, 536-37)* on the basic premise that witness Clark was not personally involved. I reject this argument. Mr. Clark was personally involved with Jack Morris, who is the same person Robert S. Heimann used in his attempt to exculpate himself by testifying that Jack Morris told Robert S. Heimann that Robert S. Heimann would have "no problem getting licensed." (Tr. 619.) That is, Robert S. Heimann is doing exactly what his counsel is arguing against, by invoking Jack Morris' hearsay to help Robert S. Heimann's case. (See my analysis in Respondents' allegedly *unsupported finding no.16, supra.)* It is neither fair nor logical to allow Robert S. Heimann to invoke this PACA official, but not

allow the PACA officials to use Jack Morris' hearsay.

Moreover, there is no question but that reparations were avoided and are still unpaid in the four *Gilbert* cases, of which I took official notice, *supra.* Therefore, Question l0c should also have been answered "yes." Respondents have not put forward at any time, at any stage of these proceedings, any evidence that Robert S. Heimann ever paid the reparations awarded. Moreover, it is not

Complainant's responsibility to determine for the AU whether Respondents have any evidence of repayment. If Respondents had any evidence that the reparation awards were paid, it was their obligation to produce such evidence.

To find otherwise (or to make no finding) on these issues raised by the *Gilbert* cases could allow Respondents (like Robert S. Heimann) to frustrate the remedial purposes of the Act. In fact, the great difficulty USDA *now* faces in prosecuting Robert S. Heimann in *Royal* and *Midland,* for what are really garden variety violations, relates directly to Robert S. Heimann's refusal to produce the *Gilbert* records, which would have been the basis for a disciplinary action for the *Gilbert* violations.

Moreover--and this is crucial--once Robert S. Heimann became convinced that he could continue operating as a produce dealer by just stonewalling PACA officials' demands for regulated produce dealer records, by just refusing to cooperate with PACA requirements, and by just maintaining control from the background, the stage was set for the complex operating entities which became Royal and Midland (and to a different extent, Continental). Respondents' counsel's arguments about laches (Tr. *552)* and a 2-year 'imitation on unpaid reparations (Tr. *518-19)* at the hearing are really inapposite. The ongoing suspension is specifically for unproduced records, *not for* unpaid *reparations.* Complainant's counsel made this clear in his argument at the hearing (Tr. *516-18).* Essentially, a Respondent cannot be licensed until demanded records are produced-"[i]t's almost a standard automatic procedure under the Act . . . if someone is requested to produce records and he does not" *(Id.).*

Moreover, the doctrine of laches does not apply to the Federal Government acting in its sovereign capacity; and, there is no other statute of limitations, or USDA policy, or USDA regulation, on the time allowed for the production of demanded records, as follows (this is from another "failure to pay" license revocation proceeding under the PACA: *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1616 (1993)):

Finally, Respondent contends that laches should apply. . . . I have repeatedly held that laches does not apply to the Government acting in its sovereign capacity. As stated in *In re Catanzaro,* 35 Agric. Dec.26, 34 (1976), *aff'd,* 556 F.2d *586* (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977):

Whether it was in the public interest for the complainant to delay bringing the disciplinary proceeding in this case for three years is a question of administrative judgment which is not for me to decide. For the purposes of this proceeding, it is settled that, as stated in *In re George Steinberg & Son,* 32 Agriculture Decisions, 236, 261(1973), affirmed sub *nom. George Steinberg & Son, Inc. v. Butz,* 491 F.2d *988* (C.A. 2), certiorari denied, 417 U.S. 904, "laches does not apply to the United States, its officers or agents. *United States v. Summerlin,* 310 U.S. 414, 416; *Federal Maritime Commission v. Caragher,* 364 F.2d 709, 718 (C.A. 2); *Thompson v. United States,* 312 F.2d 516, 519 (C.A. 10), certiorari denied, 373 U.S. 912; *United States v. Merrick Sponsor Corp.*, 294 F. Supp.

***1048,* 1052 (E.D.N.Y.), affirmed, 421 F.2d 1076 *(C.A.* 2)."**

Similarly, in *Silverman v. CFTC,* 549 F.2d 28, 34 (7th Cir. 1977), the court held:

The petitioner also invoked the doctrine of laches because *(1)* the violations occurred in 1970 and 1972 whereas the complaint was filed on March 13, 1973, and (2) the hearing file was submitted to the Administrative Law Judge on December 30, 1974 whereas his decision was filed on December 30, 1975. "It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights." *United States v. Summerlin,* 310 U.S. 414, 416, 60 S.Ct. 1019, 1020, 84 L.Ed. 1283 (1940).[6]

[6]*Accord Chromcraft Corp. v. United States Equal Employment Opportunity Comm'n,* 465 F.2d 745 (5th Cir. 1972); *Thompson v. United States,* 312 F.2d *516* (l0th Cir. 1962), *cert. denied,* 373 U.S. 912 (1963); *United States v. Sabine Towing & Transp. Co., Inc.,* 289 F. Supp. 250 (E.D. La.
1968); *United States v. Transamerica Ins. Co.,* 357 F. Supp. 743 (E.D. Va. 1973); *In re Finger Lakes Livestock Exchange,*
***inc.,* 48 Agric. Dec. 390, 404-07 (1989).**

Finally, from a public policy standpoint, there is no apparent reason to reward misbehavior--such as the chronic refusal to produce demanded records--with the eventual lapsing of relevant charges against a Respondent who stonewalls investigators. One need not search for an example of this, because these proceedings, *sub judice,* are sufficient to show the mischief of which such Respondents

are capable. The record is clear that Respondent Robert S. Heimann basically just walked away from Gilbert. The four companies (out of nine) which were not compensated by the other Respondents (the produce buyers) lost a total of *$56,500.75.* Did Robert S. Heimann just get to keep their money? Misbehavior must not be rewarded. The message must go out to the industry, that if you violate the PACA, and subsequently refuse to divulge records, do not expect that the passage of a few years will mean that the Secretary is going to forget your misbehavior.

IV. **Respondents' Procedural Argument That, Since Complainant Did Not Use and Follow 7 C.F.R §§ 47.47-68 to Decide Robert S. Heimann's Responsibly-connected Status, the ALJ Has No Authority to Do So, Is Without Merit.**

Respondents' argument is that responsibly-connected determinations must be made procedurally pursuant to 7 C.F.R. §§ 47.47-68. Although responsibly-connected determinations are made under that provision, the Secretary has much more such authority under the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted By The Secretary Under Various Statutes (7 C.F.R. §§ 1.130- 151). And, it is under the latter regulations that the Complainant brought, and the ALJ decided, the present proceedings. The Complainant has analyzed this procedural question correctly and succinctly; and, since I completely agree with Complainant's analysis, I adopt it as my own, as follows (Complainant's Response, *supra,* at 3-5):

Respondents argue that Robert Heimann may only be held accountable for the actions of Royal Fruit and Midland in a responsibly connected proceeding under the

Rules of Practice that appear in 7 C.F.R. 47.47-47.68. This argument is without merit. Complainant has sought, and the ALJ has made, a determination that Robert Heimann engaged in willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. 499b(4)), not a determination that Robert Heimann was responsibly connected to Royal Fruit by reason of his status as an officer, director or holder of more than 10 per centum of the outstanding Royal Fruit stock. The ALJ has procedural authority to make the finding requested under the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. 1.130-1.151). Section 1.131(a) lists the separate statutory provisions under which adjudicatory proceedings may be prosecuted in accordance with these Rules of Practice. Included is:

> **Perishable Agricultural Commodities Act, 1930, sections 3(c), 4(d), 6(c), 8(a), 8(b), 8(c), 9 and 13(a), (7 U.S.C. 499c(c), 499d(d), 499f(c), 499h(a), 499h(b), 499h(c), 499m(a)).**

The Royal Fruit proceeding (PACA Docket No. D-93-549) was instituted by a complaint that requests the ALJ find pursuant to section 8 of the PACA (7 U.S.C. 499h) that the respondents (Royal Fruit Co., Inc., and Robert S. Heimann) have committed willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. 499b(4)). The ALJ is expressly authorized to make the requested finding under section 8(a) of the PACA (7 U.S.C. 499h(a)) by 7 C.F.R. 1.131(a).

The Midland proceeding (PACA Docket No. *D-93-548)* was instituted by a Notice to Show Cause and Complaint that requests the ALJ find pursuant to section 8(c) of the

PACA (7 U.S.C. 499h(c)) that respondents (Midland Banana & Tomato Co., Inc., Susan E. Heimann, Robert S. Heimann and Jeffrey B. Heimann) have obtained a PACA license on the basis of false and misleading statements and order the license to be revoked. The ALJ is expressly authorized to make the requested finding and order revocation of the license issued to Midland under section 8(c) of the PACA (7 U.S.C. 499h(c)) by 7 C.F.R. 1.131(a).

Respondents suggest a procedural error, use of the wrong Rules of Practice, but there is nothing in the establishment of Responsibly Connected Proceedings, and Rules of Practice for their conduct, that limits the parties that may be alleged to be in violation of the Act in disciplinary proceeding[s]. Moreover, existence of statutory provisions and regulations intended to extend the regulatory scheme beyond the corporate entity provides no basis for limiting the authority of the Secretary to disregard the corporate entity when the evidence supports that an individual respondent is an alter ego of a corporate respondent and in his or her individual capacity, violated the PACA. In addition, the ALJ may find that an individual respondent meets the definition of "dealer" in the PACA (7 U.S.C. 499a(6)).

V. Sanction.

Turning to the sanction, the Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), *50* Agric. Dec. 476, 497 (1991), *aff'd,* 991 F.2d 803 (9th Cir. 1993), 1993 WL 128889 (not to be cited as precedent under 9th Circuit Rule 36-3), as follows:

> It is appropriate to state expressly the practice that has been followed by the Judicial Officer in recent cases, *viz*, that reliance will no longer be placed on the "severe" sanction policy set forth in many prior decisions, e.g., *In* re *Spencer Livestock Comm 'n Co.*, 46 Agric. Dec. 268, 435-62 (1987), *aff'd on other grounds*, 841 F.2d 1451 (9th Cir. 1988). Rather, the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

In a recent PACA payment-violation case, the administrative policy as to payment violations is explained as follows *(In re The Norinsberg Corp., 52* Agric. Dec. 1617, 1627-29 (1993), *affd,* 47 F.3d 1224 (D.C. Cir. 1995):

> Clare Jervis, Senior Marketing Specialist, PACA Branch, United States Department of Agriculture, expressed the Department's recommendation that Respondent's license be revoked, stating (Tr. 93-96):
>
> > A. We are seeking the revocation of the license for the Norinsb[e]rg Corporation.

Q. Is this sanction consistent with sanctions imposed in other cases, where the allegations are similar to this?

A. Yes.

Q What factors were considered in fashioning this sanction by the Department?

A. We look at several factors: the number of violations, the dollar amount, the time period and the effect of these types of violations, failures to pay, upon the industry.

In this particular case, the Norinsb[e]rg Corporation, based upon the Mr. Addington's investigation, and my review, failed to pay ten sellers for 46 lots of produce, a dollar amount totalling about $424,000.

The period that the transactions occurred were April of 1991 through February of 1992, and as I testified earlier, although they have made some payments for this debt, they still owe approximately $276,000 for transactions that occurred through 1991 and into 1992.

Q. What is the effect of these types of violations on the industry?

A. The effect of these types of violations upon the industry is very -- it can be a serious effect. The produce industry is a very unique industry and this is the result of the commodities, fruits and vegetables, which have a very short shelf life, and as a result, they have to move from the growing areas rapidly, over thousands of miles, to reach the consumer, at the height of its edible appeal.

As a result of the fast nature in which the produce must be shipped, the industry relies upon what we refer to as a trust relationship with each other. The buyers --or I should say the shippers and the buyers make their transactions based upon a few phone calls, without having the opportunity to meet each other or perform extensive credit checks that are so common in other industries.

So, as a result, they are trusting, based upon a few phone calls, that each party will perform in accordance with the contract.

The shipper/supplier trusts that the buyer will receive the produce and make prompt sales and remit in accordance with the contract terms.

The buyer, on the other hand, trusts that the shipper will ship the quality and quantity of the produce it ordered, in order to meet its customers' demands.

This trust relationship is what the industry relies upon in the marketing chain of the produce.

114 Q. And if this marketing chain breaks down, what happens?

A. When the marketing chain breaks down, specifically with failures to make full payment, the trust relationship is broken in the industry. In other words, if A fails to pay B, B is under hardship to pay C. It's what we refer to as a domino or ripple effect throughout the industry.

Q. And what is your understanding of the role of the Secretary of Agriculture in maintaining this trust relationship between buyers and sellers of the produce industry.

A. My understanding is that the Secretary is charged with enforcing the PACA and thereby insuring that the industry is able to operate on this trust relationship.

The Secretary, by issuing a PACA license to a produce firm, is making a statement to the industry that this firm

is financially responsible, and that firm will operate in accordance with the PACA.

Second, the Secretary, by imposing sanctions for failure to make full payment promptly, is making a statement to the industry that if a firm buys produce and fails to pay for the produce, then that firm will be held accountable. Violations won't be tolerated.

And the net effect of the Secretary's imposing sanctions is that it serves as a deterrent to the entire produce industry. It's a very strong message that the Secretary will prosecute violations whenever and wherever they occur. And it serves as an indication to the entire industry as to what the consequences are for failing to make full payment promptly or in violating the Act.

Q. And as far as equal treatment of other licensees, what effect does it have?

A. Equal treatment, the Secretary, in imposing sanctions on produce firms in the industry, these sanctions are imposed through even-handed enforcement by the Secretary, and as a result, I had said just a few minutes ago, that it provides the trust -- it enables [an entity] to operate in this trust relationship. In other words, it gives them a level playing field for all parties to transact.

Complainant's sanction witness, Mr. Clark, produced an explanation of administrative policy on payment violations very similar to that in *Norinsberg, supra.* It is too lengthy to reproduce here, but it is a strong message that the Secretary will prosecute violations whenever and wherever they occur (Tr. 528-39). The trust among

industry participants must be preserved for the industry to function properly.

Royal stipulated to the payment violations lodged in the Complaint, and filed no appeal. The ALJ is correct that the violations were flagrant because Royal failed to pay promptly and in full for amounts not *de minimis* *(Napolitano, supra,* 52 Agric. Dec. at 1612). Violations are repeated if there is more than a single violation. *(Id.* at 1611). Because Royal failed to pay 21 sellers for 97 lots of produce totalling *$500,370.54,* the violations are repeated and flagrant violations of section 2(4) of the Act (7 U.S.C. § 499b(4)).

The Department's policy, in this respect, has been followed consistently for more than 20 years, and was set forth at great length in *In re The Caito Produce Co.,* 48 Agric. Dec. 602, 604-42, slip op. at *5-57* (1989), which decision has been attached as an appendix to almost every payment violation case decided since then, including *Norinsberg, supra. Caito* is attached as an Appendix to this decision. To summarize just a few of the key holdings in *Caito,* it is stated in *Caito* (48 Agric. Dec. 602, 612-14, 617, 622, 642, slip op. at 15-18, 22, 29, 57):

Failure to pay for produce is a very serious violation of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), which esults in an order revoking the license of the offender,[9] since it is the "goal [of the Perishable Agricultural Commodities Act] that only financially

[9]*E.g., In re John A. Pirrello Co.,* 48 Agric. Dec. [565 (1989)]; *In re*
***Charles Crook Wholesale Produce & Grocery Co.,* 48 Agric. Dec. [557**

(1989)]; *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173 (1987); *In re B.G.*
Sales Co., 44 Agric. Dec. 2021, 2025 (1985); *In re Cuttone*, 44 Agric. Dec.
1573 (1985), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished);
In re Farm Market Service, Inc., 44 Agric. Dec. 316 (1985); *In re Clarence*
Miller Co., 43 Agric. Dec. 529 (1984); *In re Gilardi Truck & Transp., Inc.*, 43
Agric. Dec. 118 (1984); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec.
1505 (1983); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 410 (1983); *In re*
Old Virginia, Inc., 42 Agric. Dec. 270, 272 (1983); *In re Melvin Beene*
Produce Co., 41 Agric. Dec. 2422, 2425 (1982), *aff'd*, 728 F.2d 347 (6th Cir.
1984); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1126 (1982), *appeal*
dismissed, No. 82-4144 (2d Cir. Oct.13, 1982); *In re Wayne Cusimano, Inc.*,
40 Agric. Dec. 1154, 1156-59 (1981), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In*
re Mel's Produce, Inc., 40 Agric. Dec. 792, 793 (1981); *In re United Fruit &*
Vegetable Co., 40 Agric. Dec. 396, 401-02 (1981), *aff'd*, 668 F.2d 983 (8th
Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric.
Dec. 109, 112 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in*
41 Agric. Dec.89 (1982); *In re Baltimore Tomato Co.*, 39 Agric. Dec. 412,

414-16 (1980); *In re Hal Merdler Produce, Inc.*, 37 Agric. Dec. 809, 811-12
(1978); *In re Solt*, 35 Agric. Dec. 721, 723, 726 (1976); *In re Catanzaro*, 35
Agric. Dec.26, 30-36 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977)
(unpublished), *printed in* 36 Agric. Dec. 467; *accord In re Kafcsak*, 39 Agric.
Dec. 683, 686-87 (1980), *aff'd* 673 F.2d 1329 (6th Cir. 1981) (unpublished),
reprinted in 41 Agric. Dec.88 (1982).

responsible persons should be engaged in the perishable agricultural commodities industry,"[10] and it is the policy of this Department to impose

[10] *Marvin Tragash Co. v. USDA*, 524 F.2d 1255, 1257 (5th Cir. 1975); *accord Chidsey v. Guerin*, 443 F.2d 584, 588-89 (6th Cir. 1971); *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2425 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1168 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1133 (1981); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 402 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007

(1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), printed in 41 Agric. Dec.89 (1982).

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severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents, but also to other potential violators....

"Failure to pay violations not only adversely affect the party who is not paid for produce, but such violations have a tendency to snowball. 'On occasions, one licensee fails to pay another licensee who is then unable to pay a third licensee.' This could have serious repercussions to producers, licensees and consumers."[13]

[13] *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2426 (1982), *affd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. *1154*, 1169 (1982), *affd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982); *accord In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1134 (1981). Although the Act is primarily to protect producers, it "is also 'for the protection of consumers' (H.R. Rep. No.1196, 84th Cong., 1st Sess., p.2), inasmuch as increased industry costs resulting from failures to pay or other unfair practices are ultimately borne by consumers." *In re Catanzaro*, 35 Agric. Dec.26, 33 (1976),

aff,d, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977).

Even though a respondent has good excuses for payment violations, perhaps beyond its control, such excuses are never regarded as sufficiently mitigating to prevent a respondent's failure to pay from being considered flagrant or willful. As stated by the Judicial Officer in *In re Finer Foods Sales Co.,* 41 Agric. Dec. 1154, 1171(1982), *aff'd,* 708 F.2d 774 (D.C. Cir. 1983):

Even if respondent had been completely unaware that it's transactions from February to July 1979 were risky, and 115

even if it were determined that respondent had a good excuse for the failures to pay involved here, it has repeatedly been held under the Act that all excuses are routinely rejected in determing whether payment violations occurred or whether violations were wilful since "the Act calls for payment - not excuses."[16]

[16]"*Accord In re John A. Pirrello Co.,* 48 Agric. Dec. [565 (1989)] (nonpayment because respondent's customers ceased doing business with respondent when the city announced it was taking respondent's property by eminent domain); *In re Anthony Tammaro, Inc., 46* Agric. Dec. 173, 177 (1987) (nonpayment because of bankruptcy resulting after respondent suddenly lost its largest customer); *In re B.G. Sales Co., 44* Agric. Dec. 2021, 2028 (1985) (nonpayment because bank suddenly refused to

extend credit as it agreed, and the bank took $50,000 of respondent's funds in the bank's possession); *In re Magic City Produce Co., 44* Agric. Dec. 1241, 1246 n. 3 (1985), *aff'd mem,* 796 F.2d 1477 (11th Cir. 1986) (nonpayment because respondent suffered about $200,000 in losses in 2-year period from theft of produce from his warehouse); *In re Jarosz Produce Farms, Inc.,* 42 Agric. Dec. 1505 (1983) (nonpayment because of bankruptcy caused by failure of large purchaser from respondent to comply with its contractual agreement); *In re Oliverio, Jackson, Oliverio, Inc.,* 42 Agric. Dec. 1151(1983) (nonpayment because another firm failed to pay respondent $248,805.66); *!n re Bananas, Inc.,* 42 Agric. Dec. 588 (1983) (nonpayment because of a major customer's insolvency, the failure of other debtors to pay respondent, and increased operating costs); *In* re *Melvin Beene Produce Co.,* 41 Agric. Dec. 2422, 2428, 2442-44(1982) (nonpayment because of bankruptcy), *Aff'd,* 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.,* 41 Agric. Dec. *1154,* 1171(1982) (nonpayment because of bankruptcy), *aff'd,* 708 F.2d 774 (D.C. Cir. 1983); *In re Carlton F. Stowe, Inc.,* 41 Agric. Dec. 1116, 1129 (1982) (nonpayment because of bankruptcy of another firm owing respondent $776,459.23), *appeal dismissed,* No.82-4144 (2d Cir. Oct.13, 1982); *In re V.P.C., Inc.,* 41 Agric. Dec. 734, 746-47 (1982) (nonpayment because of financial difficulties); *In re Connecticut Celery Co.,* 40 Agric. Dec. 1131, 1138-40 (1981) (nonpayment because respondent suddenly and unexpectedly lost a major sales account); *In re United Fruit & Vegetable Co.,* 40 Agric. Dec. 396, 404 (1981) (nonpayment because of financial difficulties), *aff'd,* 668 F.2d 983 (8th Cir.), *cert. denied,* 456 U.S. 1007 (1982); *In re Columbus Fruit Co.,* 40 Agric. Dec. 109, 113 (1981) (nonpayment because respondent lost a major sales account and a large supplier changed its

course of dealing with respondent, demanding cash on delivery), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec.89 (1982); *In re Kafcsak*, 39 Agric. Dec. 683, 685-86 (1980) (nonpayment because of strike and failure of others to pay respondent), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (unpublished), *reprinted in* 41 Agric. Dec.88 (1982); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 709-14 (1978) (nonpayment because of failure of others to pay respondent); *In re Catanzaro*, 35 Agric. Dec.26, 31(1976) (nonpayment because of railroad strike), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 266-68 (1973) (nonpayment because of financial difficulties), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *accord In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (1981) (nonpayment because of financial difficulties, including difficulty in collecting from others), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re CB. Foods, Inc.*, 40 Agric. Dec.
961(1981) (nonpayment because respondent lost a major sales account and three large suppliers would no longer extend credit), *aff'd mem.*, 681 F.2d 804 (3d Cir. 1982), *cert. denied*, 459 U.S. 831(1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632-33, *1641-42* (1976) (nonpayment because of financial difficulties), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (unpublished), *cert. denied*, 439 U.S. 819 (1978); *In re Solt*, 35 Agric. Dec. 721, 723-24 (1976) (nonpayment because of bankruptcy of another firm owing respondent over $130,000.00); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (nonpayment because of financial difficulties); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949) (nonpayment because of financial difficulties); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1944) (nonpayment

because of financial difficulties). The reasons why all excuses are rejected in payment violation cases under the Perishable Agricultural Commodities Act, and why they are not regarded as mitigating circumstances, are set forth in *In re Esposito*, 38 Agric. Dec. 613, 632-40 (1979). In that case it is stated, *inter alia* (38 Agric. Dec. at 635-40):

In addition, many firms which experience losses that result in their ultimate failure to pay experience such losses because they were not sufficiently cautious in extending credit. See, *e.g.*, *In re J. H. Norman & Sons Distributing Co.*, 37 Agr Dec 705, 708-709 (1978).

But even where the failure to receive payment could not have been reasonably foreseen, and the firm immediately discontinues business (being unable to pay all of its creditors), if "a licensee is going to extend credit to its purchasers in this regulated industry, it must be adequately capitalized to be able to sustain any losses that result." *In re J. H. Norman & Sons Distributing Co.*, 37 Agr Dec 705, 719 (1978).

However, it should be emphasized that the revocation order in this case is not being issued for any *punitive* reasons. Respondent has done nothing worthy of *punishment.* Respondent has committed no action even remotely resembling a crime. The offenses here were *mala prohibita*--not *mala in se.* There is nothing inherently evil in being unable to pay one's creditors promptly. But, as shown above in §§ II, III and this section, there is no

place in the highly-regulated produce industry for a firm that takes up to a year to pay produce shippers, unless *written* agreements for such lengthy credit terms were obtained at the time the contracts were entered into.

Although *Caito* mentions briefly the Department's severe sanction policy, which has not been followed since *S.S. Farms Linn County, supra,* the overriding doctrine set forth in *Caito* is that, because of the peculiar nature of the perishable agricultural commodities industry, and the Congressional purpose that only financially responsible

persons should be engaged in the perishable agricultural commodities industry, excuses why payment was not made in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money, usually over an extended period of time. That doctrine is not altered by the new sanction policy set forth in *S.S. Farms Linn County.*

The ALJ also correctly concluded that the violations were willful, when he wrote, as follows (Initial Decision at 16):

Under the Act, a violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act which is prohibited by a statute or if a person carelessly disregards the requirements of a statute. *In re H.M. Shield, Inc.,* 48 Agric. Dec. 573, 581(1989), *aff'd per curiam,* 893 F.2d 347 (11th Cir. 1989)(unpublished). Over the course of several months, Royal continued to purchase produce in large quantities when it was unable

to pay its suppliers; therefore, even under the stricter standard set forth in some circuits, *see, e.g., Capitol Packing Co. v. United States,* 350 F.2d 67, 78-79 (10th Cir. 1965), the violations would still be willful in view of Royal's blatant disregard of express regulations requiring prompt payment.

The Eighth Circuit defined willfulness in much the same way, as follows *(Cox v. USDA,* 925 F.2d 1102, 1105 (8th Cir. 1991)):

Willfulness, as both parties point out in their briefs, includes not only intent to do a prohibited act but also careless disregard of statutory requirements. *Goodman v. Benson,* 286 F.2d 896, 900 (7th Cir, 1961); *accord George Steinberg & Son, Inc. v. Butz,* 491 F.2d 988, 994 (2d Cir.), *cert. denied,* 419 U.S. 830 (1974); *Arab Stock, Inc.,* 37 Agric. Dec. 293, 306 (1978), *aff'd mem.,* 582 F.2d 39 (5th Cir. 1978); *see also Butz v. Glover Livestock Comm'n Co.,* 93 S.Ct. 1455, 1459 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent.").

See atso In re Durwood Starr, 53 Agric. Dec. 461, 524-25 (1994), *aff'd in part and rev'd in part,* No. 5:94cv118 (D. Vt. July 20, 1995), as follows:
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Respondent's violations were, nonetheless, willful, within the meaning of the Administrative Procedure Act (APA). A violation is willful, within the meaning of the APA (5 U.S.C. § 558(c)), if a person carelessly disregards regulatory requirements.[28] Even under the stricter standard followed in some circuits,[29] Respondent's

conduct would still be willful in view of his disregard of express provisions of the Standards.

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[28] *See Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 186-88 (1973); *Cox v. USDA*, 925 F2d 1102, 1105 (8th Cir.), *cert. denied*, 112 S.Ct. 178 (1991); *Finer Foods Sales Co. v. Block*, 708 F2d 774, 778 (D.C. Cir.1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960).

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[29] *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079-81(4th Cir.1991); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir.1965). *See also Parchman v. USDA*, 852 F.2d 858, 864-65 (6th Cir.1988).

The penalty for repeated and flagrant violations of section 2 of the PACA (7 U.S.C. § 499b) is revocation under section 8(a) of the PACA (7 U.S.C. § 499h(a)).

But, the Administrative Procedure Act (5 U.S.C. § *558(c)*) requires that Respondents be given notice and an opportunity to come into compliance, before *revocation* of any Federal license, in the absence of a wilfulness finding. In this proceeding, however, the record shows that Royal no longer has a license (and has not filed an appeal), and Robert S. Heimann likewise does not have one to revoke. In this situation, neither revocation nor suspension is possible, rendering a willfulness finding nugatory.

Congress provided for these possibilities, however, also in section 8(a) of the PACA (7 U.S.C. § 499h(a)), when it wrote *publication* into the PACA, to make certain that only financially responsible persons are in the industry. The D.C. Circuit recently noted that publication makes the industry aware that the Secretary is very serious about flagrant and repeated violations of the payment requirements, as follows *(Frank Tambone, Inc. v. USDA, aff'd,* 50 F.3d 52, 56 (D.C. Cir. 1995)):

Publication makes the industry aware that the Secretary is intent on enforcing § 499b(4) so that, in the words of the ALJ, "only financially responsible persons are in the industry." . . . Repeated and flagrant violations demand some sort of response even when the offender no longer possesses a license, or so the ALJ and the Judicial Officer believed. When it comes to the choice of a remedy, the Judicial Officer's judgment must be sustained so long as he has complied with the statute and the regulations, adhered to the Department's announced policy on sanctions, and, to the extent his judgment rests on findings of fact, has substantial evidence to back it up. *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. at 189. The Judicial Officer in this case acted in conformity with those requirements.

Therefore, the ALJ properly published the facts and circumstances of Royal's violations, and Royal has not filed an appeal. The same publication penalty will apply to Robert S. Heimann, as an individual, that he committed repeated and flagrant violations of the Act, as was explained in a similar case under PACA (involving false and misleading statements in violation of section 2(4)

of the Act (7 U.S.C. § 499b(4)), as follows *(Lloyd Myers, supra,* 51 Agric. Dec. at 32):

The only sanction that can be applied to Lloyd Myers as an individual is publication of the finding that he has engaged in repeated and flagrant violations of the Act. Since that sanction does not involve a license suspension, willfulness (under the Administrative Procedure Act) is not an issue as to this aspect of the proceeding. *George Steinberg & Son, Inc. v. Butz,* 491 F.2d 988, 993-94 (2d Cir.), *cert. denied,* 419 U.S. 830 (1974).

I note that Robert S. Heimann is responsible for the repeated and flagrant violations of Royal, jointly and severally, under each, or all, of the theories explained by the ALJ, and listed in my Additional Conclusions: (1) Robert S. Heimann was the 100% owner of Royal and never sold or otherwise transferred ownership of Royal, and Royal was the *alter ego* of Robert S. Heimann, (2) Robert S. Heimann was, for practical purposes, an owner due to his wife's one-third share ownership, ascribed to him by his marriage relationship, and Royal was Robert S. Heimann's *alter ego,* over which he exercised dominion and control, and (3) Robert S. Heimann fit the definition of a "dealer" in PACA, and is disciplined for misbehavior as a dealer for failing to pay promptly for produce as specifically required of a dealer in section 2(4) of the PACA

(7 U.S.C. § 499b(4)).

(Moreover, I note that Robert S. Heimann has yet to clear up his ongoing suspension for non-production of demanded records, and unpaid reparation awards under

the *Gilbert* reparations cases, which sanction issues I do not address on this record.)

As regards Midland, the ALJ is correct that, under the circumstances here, the sanction for violation of section 8(c) of the PACA (7 U.S.C. § 499h(c)) is revocation of Midland's license, which revocation administrative officials and Complainant have recommended.

I also agree with the ALJ that Susan Heimann and Robert S. Heimann be named individually in the Order. Susan Heimann willfully violated PACA section 8(c) by including false and misleading statements on Midland's license application. Robert S. Heimann's domination, control, and beneficial ownership of 100% of Midland's stock means that the *alter ego* analysis applied to Robert S. Heimann in the Royal situation applies equally to Robert S. Heimann here. Robert S. Heimann shall also be a named individual in the violations leading to the revocation order. Robert S. Heimann will also be named as a "dealer" (7 U.S.C. § 499a(6)) in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Order

Robert S. Heimann has committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), which finding shall be published.

Respondents Midland Banana & Tomato, Inc., Susan E. Heimann, and Robert S. Heimann have violated section 8(c) of the PACA (7 U.S.C. § 499h(c)), and the license of Midland Banana & Tomato, Inc., is hereby revoked.